

LARRY W. GABRIEL - Bar No. 68329  
JENKINS MULLIGAN & GABRIEL, LLP  
21650 Oxnard Street, Suite 500  
Woodland Hills, CA 91367  
Telephone: (818) 827-9000  
Facsimile: (818) 827-9099  
Email: lgabriel@ebg-law.com

Special Litigation Counsel or Bradley D. Sharp,  
Chapter 11 Trustee, Estate of C.M. Meiers  
Company, Inc.

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO VALLEY DIVISION**

In re  
C.M. MEIERS COMPANY, INC.,  
Debtor.

BRADLEY D. SHARP, CHAPTER 11  
TRUSTEE, ESTATE OF C.M. MEIERS,  
COMPANY, INC.

Plaintiff,

vs.

ESSEX INSURANCE COMPANY, INC.

Defendant.

Case No. 1:12-bk-10229-MT

Chapter 11

Adv. No. 2:14-ap-01042-MT

**PLAINTIFF'S REPLY TO:**

**DEFENDANT'S RESPONSE TO  
PLAINTIFF'S STATEMENT OF FACTS  
AND STATEMENT OF GENUINE ISSUES  
IN DISPUTE IN OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT**

**[RULE 56, FED.RULES OF CIV. PROC.]**

DATE: December 3, 2014

TIME: 1:00 p.m.

PLACE: Courtroom 302

United States Bankruptcy Court  
21041 Burbank Blvd.

Woodland Hills, California 91367

Plaintiff, Bradley D. Sharp, in his capacity as the duly appointed chapter 11 trustee (the "Trustee") of the bankruptcy estate of C.M. Meiers, Company, Inc., ("C.M. Meiers") debtor, pursuant to Central District of California Rule 56-1, as the moving party on the motion for summary judgment submits this Reply to Defendant's Response to Plaintiff's "Statement of Uncontroverted Facts and Conclusions of Law".

In this pleading, the Trustee presents his Statement of Undisputed Facts, the Defendant's Response as presented in his Response to Plaintiff's Statement of Facts and Statement of Genuine

Issues In Dispute In Opposition To Motion for Summary Judgment, and the Trustee's Reply to the Defendant's filing.

**I. STATEMENT OF FACTS**

**A. BACKGROUND INFORMATION REGARDING DEBTOR, C.M. MEIERS**

1. Before filing for bankruptcy on January 9, 2012, [*In re C.M. Meiers Company, Inc.*, 1:12-bk-10229- MT, ECF Docket No. 1] C.M. Meiers was owned and controlled by Defendants Herbert Rothman (CEO and 89% owner and director), Rebecca Rothman ( officer and director) and their adult son, Eric Rothman (Vice President and 11% owner and director) (collectively, the "Rothman Parties").

a. Evidence: Request for Judicial Notice ("RJN") 7; Omnibus Declaration of Eric Rothman in Support of Debtor's Emergency Motions et etc. , filed in C.M. Meiers bankruptcy case, case no. 1:12-bk-10229-MT [ECF Doc. #11] p.2: ¶¶ 2-3.

b. Defendant's Position:

Undisputed for the purposes of this motion that, prior to filing bankruptcy, C.M. Meiers Company, Inc. ("C.M. Meiers" or "CMM") was operated by Herbert Rothman and Eric Rothman. The remaining statements in this purported statement of "undisputed fact" are not supported by any of the evidence cited by the Trustee.

c. Trustee's Reply:

In the declaration of Eric Rothman (RJN # 7, p. 197; Dec. ¶ 3) Eric Rothman states:

"Until the filing of the bankruptcy case, C.M. Meiers was operated by Herbert Rothman as CEO, myself as Vice President, and corporate President Dianne Ewing. Ms. Ewing resigned her position on January 10, 2011. The stock of the Debtor is owned 89% by Herbert Rothman and 11% by myself."

Essex has produced no other evidence to the contrary to put this fact in issue.

///

1           2.       C.M. Meiers had been in business since 1939, and had over 50 employees working for  
2 the firm. C.M. Meiers offered commercial insurance, personal insurance, health and life insurance,  
3 special programs, high net worth insurance and entertainment insurance. C.M. Meiers had satellite  
4 offices in Torrance, California and Dallas, Texas.

5                   a.   Evidence: *Id.* at p.2: ¶ 4.

6                   b.   Defendant's Position:

7                           Undisputed for the purposes of this motion.

8           3.       Prior to its bankruptcy, C.M. Meiers acted both as an insurance broker and as an  
9 agent for insurance carriers ("carriers").

10                   a.   Evidence: *Id.* at p. 3-4: ¶ 7.

11                   b.   Defendant's Position:

12                           Undisputed for the purposes of this motion.

13           4.       C.M. Meiers acted as an agent for approximately 18 carriers and as a broker for  
14 approximately 162 carriers.

15                   a.   Evidence: *Id.* at p. 3-4: ¶ 7.

16                   b.   Defendant's Position:

17                           Undisputed for the purposes of this motion.

18           5.       In circumstances in which it was acting as broker, C.M. Meiers sold an insurance  
19 product and billed the client for the premium. C.M. Meiers delivered the policy to the client,  
20 obtained the premium payment from the client and sent the premium, less the commission to the  
21 carrier.

22                   a.   Evidence: *Id.* at p. 3-4: ¶ 7.

23                   b.   Defendant's Position:

24                           Undisputed for the purposes of this motion.

25           6.       Where C.M. Meiers acted as agent, it was authorized to issue a binder on behalf of  
26 the carrier.

27                   a.   Evidence: *Id.* at p. 3-4: ¶ 7.

28   ///

1 b. Defendant's Position:

2 Undisputed for the purposes of this motion.

3 7. Depending on the policy, some of these policies were directly billed by the carrier,  
4 which paid C.M. Meiers its commission at a later date, while for others, C.M. Meiers billed the  
5 client and collected all premiums due. In such case C.M. Meiers was to deposit the collected funds  
6 into C.M. Meiers' trust account (the "Trust Account") to pay the Carrier the premium and retain its  
7 commission.

8 a. Evidence: *Id.* at p. 3-4: ¶ 7.

9 b. Defendant's Position:

10 Undisputed for the purposes of this motion.

11 8. C.M. Meiers solicited business and transacted the sale of insurance policies either  
12 through the efforts of its owner/director/officers ("House Accounts") or through independent  
13 contractors and two employees (collectively referred to by C.M. Meiers as the "Producers").

14 a. Evidence: *Id.* at p. 4-5: ¶¶ 8-11.

15 b. Defendant's Position:

16 Undisputed for the purposes of this motion.

17 9. The Producers were contracted to solicit insurance on behalf of themselves, which  
18 C.M. Meiers agreed to write pursuant to the Carrier Agreements in which case C.M. Meiers acted as  
19 the broker or agent of record.

20 a. Evidence: *Id.* at p. 4-5: ¶¶ 8-11.

21 b. Defendant's Position:

22 Undisputed for the purposes of this motion.

23 10. C.M. Meiers would receive a percentage of the commission generated by the Producers  
24 and would receive the entire commission for all policies generated as House Accounts.

25 a. Evidence: *Id.* at p. 4-5: ¶¶ 8-11.

26 b. Defendant's Position:

27 Undisputed for the purposes of this motion.

28 ///

1 11. C.M. Meiers billed the client and collected all premiums due, and was to deposit  
2 the collected funds into C.M. Meiers' trust account (the "Trust Account") to pay the carrier the  
3 premium and retain its commission.

4 a. Evidence: *Id.* at p. 3-5: ¶¶ 6-11.

5 b. Defendant's Position:

6 Undisputed for the purposes of this motion.

7 12. The Trust Account is a required statutory trust account pursuant to California  
8 Insurance Code §§ 1733, 1734 and 1734.5 and its use is restricted as set forth in the Insurance Code.

9 a. Evidence: *Id.* at p. 7-9: ¶ 20; RJN 8; California Insurance Code §§ 1733,  
10 1734 and 1734.5 [Exhibit 13]

11 b. Defendant's Position:

12 Undisputed for the purposes of this motion.

13 13. The Trust Account was to consist entirely of premiums due to insurance carriers for  
14 policies sold by C.M. Meiers and commissions due to C.M. Meiers (including the share of the  
15 commission due to each CMM Producer).

16 a. Evidence: *Id.*

17 b. Defendant's Position:

18 Undisputed for the purposes of this motion.

19 14. Throughout any given month, C.M. Meiers would withdraw money from the Trust  
20 Account to pay commissions, or to remit client premiums, less commissions to the carriers.

21 a. Evidence: RJN 7 at pp. 7-9: ¶ 20.

22 b. Defendant's Position:

23 Undisputed for the purposes of this motion.

24 **B. DISCOVERY THAT THE C.M. MEIERS TRUST ACCOUNT WAS OUT OF**  
25 **TRUST**

26 15. In or around November 2011, the Rothman Parties first became aware that there was  
27 an issue with the administration of the C.M. Meiers Trust Account.

28 ///

Evidence: RJN 7; See also, Declaration of Bradley D. Sharp (“Sharp Dec.”) ¶ 20; RJN 10, Supplemental Declaration of Eric Held.

a. Defendant’s Position:

Undisputed for the purposes of this motion that the Trust Account was “out of trust” in November 2011. No other aspect of this purported statement of “undisputed fact,” however, is supported by the evidence cited by the Trustee.

b. Trustee’s Reply:

See Declaration of Bradley Sharp, p. 122, Email from Melody to Jim Seth dated December 12, 2011 in which she states:

(4)Reconciliation of Trust Bank Balance- Attached is a listing (let me know if you need the detailed reports by insurance company to verify my totals } of the insurance companies whereby the client has already paid their invoice (money collected) and the insurance companies are due the net premiums. The total of the premiums due is \$1,294,929 (see page 2 of 2). In addition if the client's account is in a credit balance, the client is due this money out of the Trust Account as well. That amount is \$164,513 (page 2 of 2). The total premiums to be paid out is a total of \$1,459,442 (page 2 of 2}. The total in the Trust account is \$168,325 (page 2 of 2 or Trial Balance)1 which means there is a shortage in the Trust account of \$1,291,117 (page 2 of 2).

c. Trustee’s Reply:

Regardless of the testimony, in its Response No. 18 Essex admits that it is “Undisputed for the purposes of this motion that the Trust Account was “out of trust” in November 2011.”

16. On November 3, 2011, Herbert Rothman, Eric Rothman and Rebecca Rothman paid to the order of C.M. Meiers checks and cashier checks totaling \$272,032.40, which were deposited into the C.M. Meiers Trust Account.

1 a. Evidence: *Id.*

2 b. Defendant's Position: "Undisputed for the purposes of this motion."

3 17. The money was paid to C.M. Meiers to cover payments that needed to be made from  
4 the Trust Account because the Trust Account was "out of trust."

5 a. Evidence: *Id.*

6 b. Defendant's Position:

7 Disputed. No aspect of this purported statement of "undisputed fact" is  
8 supported by the evidence cited by the Trustee. In fact, the Trustee could  
9 not testify as to why the Rothmans deposited funds into the Trust Account.

10 c. Trustee's Reply:

11 Essex's Position is interesting for number of reasons. First, the statement is  
12 an admission that the Rothman's conduct was done intentional and was  
13 therefore, fraudulent. Conceding this "fact" Essex cannot contest its  
14 responsibility to supply a defense under the Essex Policy, based upon an  
15 assertion that the Rothman' used the Trust Account as their personal piggy  
16 bank. Accordingly, Essex's admission can only lead to the conclusion that  
17 it wrongfully failed to accept the tender of defense given there was  
18 uncertainty was to why the Trust was "out of Trust."

19  
20 18. At the time it was estimated that C.M. Meiers may have been out of Trust by as much  
21 as \$ 1.2 million.

22 a. Evidence: *Id.*

23 b. Defendants Position:

24 "Undisputed for the purposes of this motion that the Trust Account was "out  
25 of trust" in November 2011."

26 c. Trustee's position; agree.

27 19. The "out of trust" situation was created due to the failure of the Rothman Parties, as  
28 directors and officers of C.M. Meiers, to supervise and administer the business affairs of the Debtor,

1 including their failure to properly account for and audit the Trust Account to insure that the Trust  
2 Account would not become “out of trust”.

3 a. Evidence: *Id*; See also, Sharp Dec. ¶ 20.

4 b. Defendant’s Position:

5 Disputed. No aspect of this purported statement of “undisputed fact” is  
6 supported by the evidence cited by the Trustee, and the evidence shows that  
7 the Rothmans funneled money out of CMM for their personal benefit.

8 c. Trustee’s Reply: Defendant’s admission in number 17 belies their position.

9 In fact, the evidence, as presented by the Defendant, indicates that no  
10 determination has been made that the “Rothman’s funneled money out of  
11 CMM for their personal benefit.

12  
13 20. The administration and management of an Insurance Trust Account is not simple, and  
14 is not merely a matter of taking in money and making payments as in the case of an Attorney’s trust  
15 account.

16 a. Evidence: RJN 11; Declaration of Sanford Michelson submitted in support of  
17 the Debtor’s Opposition To Motion For Appointment of Chapter 11 Trustee,  
18 filed in C.M. Meiers bankruptcy case, case no. 1:12-bk-10229-MT [ECF Doc.  
19 # 47]

20 b. Defendant’s Position

21 Disputed. No aspect of this purported statement of “undisputed fact” is  
22 supported by the evidence cited by the Trustee. To the contrary, in the cited  
23 declaration, Sanford Michelson discusses whether there is evidence that the  
24 C.M. Meiers account was actually “out of trust,” – he does not discuss whether  
25 the management of a broker’s trust account is “simple” and he does not refer to  
26 the management of an attorney’s trust account in any way.

27 Controverting Evidence:

28 Declaration of Sanford Michelson, filed in C.M. Meiers bankruptcy case no.



1 1:12-bk-10229- MT(Docket No. 47) (“Michelson Declaration”). [Attached as  
2 Exhibit 11 to the Trustee’s Request for Judicial Notice (Docket No. 15)]

3 c. Trustee’s Reply:

4 Essex’s statement that Mr. Michelson “does not discuss whether the  
5 management of a broker’s trust account is “simply” wrong. In his declaration,  
6 at ¶ 5 (b) Mr. Michelson discusses the uniqueness of the broker’s account. For  
7 convenience of the court, a copy of Mr. Michelson’s declaration is attached  
8 hereto as Exhibit 1. At page 4 of his declaration Mr. Michelson describes the  
9 complexity of an insurance broker’s trust account:

10 Transaction Tracing: During the investigation, the CDOI investigators  
11 "traced" 129 different policyholder transactions. At its conclusion, the CDOI  
12 determined that fiduciary funds, as defined by the Insurance Code, were placed  
13 into the trust account, but eventually the same funds either did not get sent to  
14 the insurance company or returned to the policyholder. However, during trial a  
15 sample of 68 of the 129 "traced" transactions were reviewed. It was  
16 conclusively found and admitted by the CDOI investigators that they did not  
17 conduct a proper "tracing", given the unique nature of broker trust accounts,  
18 and that out of the 68 sample transactions, *100% of the transactions revealed*  
19 *complete compliance and no violation of the trust account.* A compelling  
20 reason for the CDOI's *admission* that the alleged tracing was incorrect was that  
21 policyholders often have multiple transactions (for example, in personal lines  
22 insurance a policyholder may have an automobile policy, homeowners, and/or  
23 roadside assistance. All three transactions must be reviewed as one transaction,  
24 from inception until present day. The reason being is that return premiums  
25 occur and are subsequently applied to renewal policies, policies are cancelled,  
26 which results in return premiums, that are offset against debts owed a  
27 brokerage for various forms of service fees, etc.)

28 ///

**C. THE C.M. MEIERS BANKRUPTCY**

21. On January 9, 2012, C.M. Meiers filed its Chapter 11 petition.

a. Evidence: RJN 12; C.M. Meiers Bankruptcy Petition Case no. 1:12-bk-10229-MT, ECF Doc. # 1.

b. Defendant's Position:  
Undisputed.

22. Shortly thereafter, Mr. Sharp was appointed the Chapter 11 Trustee.

a. Evidence: RJN 13; Motion and Orders re Appointment of Bradley M. Sharp as chapter 11 trustee, case no. 1:12-bk-10229-MT, ECF Doc. #s 66,74.

b. Defendant's Position:  
"Undisputed for the purposes of this motion."

23. As of January 25, 2012, the Debtor's books and records disclose that C.M. Meiers had a "net payable" to various insurance companies in the amount of \$1,085,659.14.

a. Evidence: RJN 10, Supplemental Declaration of Eric Held.

b. Defendant's Position:  
"Undisputed for the purposes of this motion."

24. As of January 25, 2012, C.M. Meiers' Trust Account had an account balance of \$11,783.20 and was "out of trust" by an amount in excess of \$1 million. The out of trust has been determined to be the approximate amount of \$1.2 million.

a. Evidence: Sharp Dec., ¶ 15; RJN 10, 16

b. Defendant's Position:

Undisputed for the purposes of this motion that, as of January 25, 2012, C.M. Meiers' Trust Account had an account balance of \$11,783.20 and was "out of trust" by an amount in excess of \$1 million.

25. The Trustee alleges as a direct and proximate cause of the Rothman Parties breach of fiduciary duty in the administration of the C.M. Meiers trust account, C.M. Meiers was damaged in an amount in excess of \$4 million.

///

1 a. Evidence: Sharp Dec. ¶¶ 21-23.

2 b. Defendant's Position:

3 Undisputed that the Trustee makes the stated argument in his Declaration, but  
4 this argument is not a "fact," much less an undisputed one. As explained in  
5 detail in Section V.D. of Essex's opposition brief the Trustee's argument has  
6 no legal or factual basis.

7 c. Trustee's Reply:

8 Essex presents no testimony (expert or otherwise) to contest the damage claim  
9 of the Trustee.

10 **D. THE INSURANCE POLICY**

11 26. Essex issued its Insurance Agents and Brokers Errors and Omissions Liability  
12 Insurance Policy, Policy No. AB-351400, to C.M. Meiers and others for the June 1, 2011 to June 1,  
13 2012 Policy Period ("the Essex E & O Policy").

14 a. Evidence: Sharp Dec. ¶ 8, Exhibit 1. See also, Complaint for  
15 Declaratory Relief filed in this action, Adv. No. 2:14-ap-01042-MT [ECF Doc. # 1];

16 b. Defendant's Position:

17 "Undisputed for the purposes of this motion."

18 27. Subject to a \$25,000 per Claim Deductible applicable only to Damages, the Policy has  
19 \$5,000,000 per Claim and \$5,000,000 aggregate Limits of Liability.

20 a. Evidence: *Id.*

21 b. Defendant's Position:

22 The terms of coverage are not in dispute.

23 **E. THE TERMS AND CONDITIONS OF THE INSURING AGREEMENT**

24 The terms and conditions of the Policy cannot be disputed.

25 28. The Policy's Insuring Agreement provides:

26 A. Errors and Omissions Coverage:

27 The Company shall pay on behalf of the Insured all sums in excess of the Deductible  
28 stated in Item 5 a & b of the Declarations which the Insured shall become legally

1 obligated to pay as Damages as a result of a Claim first made against the Insured and  
2 reported to the Company during the Policy Period, Automatic Extended Reporting  
3 Period, or Optional Extended Reporting Period, if exercised, by reason of a Wrongful  
4 Act or Personal Injury in the performance of Professional Services rendered or that  
5 should have been rendered by the Insured or by any other person or organization for  
6 whose Wrongful Act or Personal Injury happens during the Policy Period or on or after  
7 the Retroactive Date stated in 'Item 6. Of the Declarations and before the end of the  
8 Policy Period.

9 a. Evidence: *Id.*

10 b. Defendant's Position:

11 "Undisputed for the purposes of this motion."

12 29. The term "Professional Services" is defined in the Policy and means the following  
13 services rendered for others:

- 14 1. Insurance Wholesaler;
- 15 2. Insurance Managing General Agent;
- 16 3. Insurance General Agent;
- 17 4. Insurance Underwriting Manager;
- 18 5. Insurance Program Administrator;
- 19 6. Insurance Agent;
- 20 7. Insurance Broker;
- 21 8. Insurance Surplus Lines Broker;
- 22 9. Insurance Consultant;
- 23 10. Insurance Claims Administrator;
- 24 11. Insurance Appraiser;
- 25 12. Insurance Premium Financier;
- 26 13. Notary Public; and
- 27 14. Life and/or Health Agent or Broker.

1                   15.     Lecturer, speaker, instructor or teacher at any Insurance convention or at any  
2 other meeting or course where approved Department of Insurance continuing education credits  
3 may be earned.

4                   16.     Expert witness concerning any Insurance related subject.

5                   a. Evidence: *Id.*

6                   b. Defendant's Position:

7                   Policy terms speak for themselves.

8                   **F.     THE CLAIMS PRESENTED AGAINST THE ROTHMAN PARTIES**

9                   30.     On or about April 19, 2012, the Trustee filed his Complaint In Intervention against  
10 Rothman Parties (*Sharp v. Herbert Rothman, et al.*, adversary case no. 1:12-ap-01118 MT . The  
11 complaint was amended (the "FAC") on or about July 12, 2012.

12                   a. Evidence: RJN 1-2.

13                   b. Defendant's Position:

14                   "Undisputed for the purposes of this motion."

15                   31.     The FAC alleges claims against all or some of the Rothmans for, among other things,  
16 breach of fiduciary duty based on the shortfall in the trust account and in administering the business  
17 affairs of CMM on its own behalf and on behalf of others (claim # 3).

18                   a. Evidence: RJN 2; Exhibit 2.

19                   b. Defendant's Position:

20                   Document speaks for itself.

21                   **G.     THE ROTHMANS' TENDER OF DEFENSE AND DENIAL OF COVERAGE**  
22                   **BY ESSEX**

23                   32.     On or about August 20, 2012, the Rothman's through their counsel, Lawrence M.  
24 Jacobson, tendered defense of the Complaint and the FAC to Essex.

25                   a. Evidence: Jacobson Dec. ¶ 2, Exhibit 1.

26                   b. Defendant's Position:

27                   Undisputed

1           33.     On October 4, 2012, Essex, through its counsel, Waxler Carner Brodsky, LLP, issued  
2 its opinion letter that the acts alleged in the FAC were not covered by the Policy's insuring provisions,  
3 and based thereon, Essex refused to provide a defense for the claims presented in the Complaint and  
4 in the FAC.

5                   a. Evidence: Jacobson Dec. ¶ 4, Exhibit 3.

6                   b. Defendant's Position:

7           **H.     THE SETTLEMENT BETWEEN THE TRUSTEE AND THE ROTHMANS**  
8           **AND ASSIGNMENT OF CLAIMS**

9           34.     On or about September 13, 2013, the Trustee and the Rothman Parties attended an all-  
10 day mediation of the Trustee's claims before the Honorable Dickran Tevrizian (Ret.) The mediation  
11 resulted in a settlement of the claims between the Trustee and the Rothman Parties (Herbert Rothman,  
12 Eric Rothman and Rebecca Rothman), pursuant to which the Rothman Parties would pay the Trustee  
13 \$500,000.00. Further, the Rothman Parties agreed to assign their rights and claims as the same may  
14 exist against Essex Insurance Company in rejecting coverage and for its failure to provide a defense to  
15 the Rothman Parties for the claims presented in the FAC, including the claims for mismanagement of  
16 the Debtor's Trust Account, which claims the Trustee believes to be in excess of \$ 4 million. In  
17 addition, the Rothmans agreed to subordinate their \$1.6 million unsecured claims to those of the  
18 estate's general unsecured creditors. In turn, the Trustee agreed that (i) Herbert Rothman shall have  
19 an allowed administrative claim of \$14,000.00; (ii) Eric Rothman shall have an allowed administrative  
20 claim of \$14,000.00; and (iii) Wen-Er. LLC shall have an allowed administrative claim of \$8,790 for  
21 post-petition taxes, insurance and association fees due under the lease between Wen-Er LLC and the  
22 Debtor, subject to a credit for any such post-petition taxes, insurance and/or association fees paid by  
23 the Trustee or the estate.

24                   a. Evidence: Gabriel Dec. ¶ 5; RJN 3-6.

25                   b. Defendant's Position:

26                   Undisputed for the purposes of this motion that the Trustee and the Rothmans  
27                   attended mediation on September 13, 2013 and that the mediation resulted in a  
28                   settlement.

1           35.     The settlement agreement was first approved by the bankruptcy court as being in the  
2 best interests of the estate, and thereafter, pursuant to motion duly made, approved as being done in  
3 “good faith”.

4                   a. Evidence: RJN 3-6.

5                   b. Defendant’s Position:

6                         Unsputed that the Bankruptcy Court approved the Trustee’s settlement with the  
7 Rothmans, but immaterial. See *Hamilton v. Maryland Casualty Co.*, 27 Cal.  
8 4th 718, 730 (2002) (explaining that good faith settlement determination does  
9 not bear on insurance coverage). Essex objects to the Trustee’s characterization  
10 of any order from the Bankruptcy Court regarding the settlement as  
11 inadmissible hearsay. Fed. R. Evid. 802. Any such order speaks for itself. Fed.  
12 R. Evid. 1002.

13                   c. **Trustee’s Reply:**

14                         Essex’s position is based upon a mischaracterization of the law.  
15 *Hamilton v Maryland Casualty Co.*, 27 Cal. 4<sup>th</sup> 718, 730 is  
16 distinguishable from the instant case. Hamilton involved a situation  
17 where the insurer provides a defense, and nonetheless the insured  
18 settles the claim and assigns it to the Plaintiff. That is not the situation  
19 here, where Essex denied coverage from the very outset. Under the  
20 circumstances presented in this case, Essex is bound by the settlement,  
21 particularly so having been given the opportunity to object to the same  
22 before approval. See, e.g. *Risely v. Interinsurance Exchange of the*  
23 *Automobile Club*, 183 Cal.App.4th 196 (2010).(Where a liability  
24 insurer denies its insured a defense for covered claims, and the insured  
25 has made a reasonable, noncollusive settlement with the third party,  
26 without the insurer's consent, the insured may assign its claims against  
27 the insurer to the third party in exchange for a covenant not to execute  
28 on the settlement; the third party may then seek damages from the

insurer for breach of duties that the insurer owed to the insured, in a separate action for breach of contract and breach of the covenant of good faith and fair dealing).

**I. ESSEX'S AND THE TRUSTEE'S COVERAGE POSITIONS**

36. On or about September 11, 2013, counsel for the Trustee wrote to Essex's coverage counsel a letter expressing his opinion that the coverage position previously taken by Essex's was unjustified as a matter of law requesting that Essex reconsider its coverage decision.

a. Evidence: Gabriel Dec. ¶ 3, Exhibit 1.

b. Defendant's Position:

Undisputed that counsel for the Trustee wrote a letter to counsel for Essex dated September 11, 2013. Essex objects to the Trustee's characterization of the September 11, 2013 letter as inadmissible hearsay. Fed. R. Evid. 802. The letter speaks for itself. Fed. R. Evid. 1002.

c. Trustee's Reply:

Undisputed.

37. On or about September 13, 2013, counsel for the Trustee again wrote to Essex's coverage counsel a letter setting forth additional support and argument for the Trustee's reason as to why coverage must be provided to the insured's, and expressing his opinion that the coverage position previously taken by Essex was unjustified as a matter of law.

a. Evidence: Gabriel Dec. ¶ 4, Exhibit 2.

b. Defendant's Position:

Undisputed that counsel for the Trustee wrote a letter to counsel for Essex dated September 13, 2013. Essex objects to the Trustee's characterization of the September 13, 2013 letter as inadmissible hearsay. Fed. R. Evid. 802. The letter speaks for itself. Fed. R. Evid. 1002

c. Trustee's Reply:

Undisputed.



1           38.     On or about September 13, 2013, the Trustee and I, together with Mr. Sharp's general  
2 counsel, David Gould, and the Rothman Parties and their counsel, attended an all-day mediation of  
3 the Trustee's claims using the services of the former Chief Judge of the United States District Court,  
4 Central District of California, the Honorable Dickran Tevrizian (Ret.) The mediation resulted in a  
5 settlement of the claims between the Trustee and the Rothman Parties (Herbert Rothman, Eric  
6 Rothman and Rebecca Rothman). Among other things, the Rothman Parties were to pay the Trustee  
7 \$500,000.00, and assign their rights and claims as the same may exist against Essex Insurance  
8 Company in rejecting coverage and for its failure to provide a defense to the Rothman Parties for the  
9 claims presented in the FAC, including the claims for mismanagement of the Debtor's Trust Account,  
10 which claims the Trustee believes to be in excess of \$ 4 million. In addition, the Rothmans agreed to  
11 subordinate their \$1.6 million unsecured claims to those of the estate's general unsecured creditors. In  
12 turn, the Trustee agreed that (i) Herbert Rothman shall have an allowed administrative claim of  
13 \$14,000.00; (ii) Eric Rothman shall have an allowed administrative claim of \$14,000.00; and (iii)  
14 Wen-Er. LLC shall have an allowed administrative claim of \$8,790 for post-petition taxes, insurance  
15 and association fees due under the lease between Wen-Er LLC and the Debtor, subject to a credit for  
16 any such post-petition taxes, insurance and/or association fees paid by the Trustee or the estate.

17           a. Evidence: Gabriel Dec. ¶ 5-6.

18           b. Defendant's Position:

19           Undisputed for the purposes of this motion that the Trustee and the Rothmans  
20 attended mediation on September 13, 2013 and that the mediation resulted in a  
21 settlement. Essex objects to the Trustee's characterization of any settlement  
22 agreement with the Rothmans as inadmissible hearsay. Fed. R. Evid. 802. Any  
23 such agreement speaks for itself. Fed. R. Evid. 1002. Essex disputes that the  
24 Rothmans agreed to pay the Trustee \$500,000 as part of the settlement. The  
25 evidence shows that the Rothmans agreed to pay only \$25,000 in the  
26 settlement.

27 ///

28 ///

1 c. Trustee's Reply:

2 The Trustee objects to Essex's characterization of the settlement agreement.  
3 It's dispute as to the interpretation of its terms is irrelevant. As noted by Essex  
4 the agreement speaks for itself.

5 39. Although invited to attend, albeit with short notice, Essex and its counsel were unable  
6 to attend the mediation.

7 a. Evidence: *Id*

8 b. Defendant's Position:

9 Undisputed that, less than two days prior to the September 13, 2013 mediation,  
10 counsel for the Trustee notified counsel for Essex of the mediation. Also  
11 undisputed that neither Essex nor its counsel attended the mediation, although  
12 counsel for Essex informed counsel for the Trustee he would be available by  
13 phone.

14 40. On or about October 30, 2013, Essex, through its coverage counsel, responded to the  
15 Trustee's counsel's letters of September 11, 2013 and September 13, 2013, reiterating Essex's  
16 position that given the facts alleged in the FAC, no coverage would be afforded to the insureds.

17 a. Evidence: Gabriel Dec. ¶ 7, Exhibit 3.

18 b. Defendant's Position:

19 Undisputed that counsel for Essex wrote a letter to counsel for the Trustee  
20 dated October 30, 2013. Essex objects to the Trustee's characterization of the  
21 October 30, 2013 letter as inadmissible hearsay. Fed. R. Evid. 802. The letter  
22 speaks for itself. Fed. R. Evid. 1002.

23 c. The statements made in the letter are party admissions. Further the letter was  
24 written by Essex's counsel and therefore is a business record.

25 41. On or about November 27, 2013, trustee's counsel sent another letter to Essex's  
26 counsel in furtherance of the Trustee's position that coverage should be afforded given the facts  
27 alleged in the complaint, the law, and the terms and conditions of the Policy.

28 a. Evidence: Gabriel Dec. ¶ 8, Exhibit 4.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

b. Essex Position:

Undisputed that counsel for the Trustee wrote a letter to counsel for Essex dated November 27, 2013. Essex objects to the Trustee's characterization of the September 13, 2013 letter as inadmissible hearsay. Fed. R. Evid. 802. The letter speaks for itself. Fed. R. Evid. 1002

c. Agree

42. Neither Essex nor its counsel responded to the letter of November 27, 2013.

a. Evidence: Gabriel Dec. ¶ 9

b. Essex Position:

Undisputed.

43. Essex was served with copies of the Motion to Approve the Settlement between the Trustee and the Rothmans, and was also served with a copy of the Good Faith Settlement Motion.

a. Evidence: Gabriel Dec. ¶ 10; RJN 3 and 5.

b. Essex Position:

Undisputed that counsel for Essex received a copy of the Trustee's motion to approve the settlement with the Rothmans and the motion for a good faith settlement determination, but immaterial. *See Hamilton v. Maryland Casualty Co.*, 27 Cal. 4th 718, 730 (2002) (explaining that good faith settlement determination does not bear on insurance coverage).

c. Trustee's Reply:

Essex's is wrong in its contention that somewhat *Hamilton* protects Essex from the claims assets. As previously noted *Hamilton* is distinguishable and does not support Essex's Position.

44. Essex did not file an objection to the approval of the motion or to the good faith settlement motion.

a. Evidence: Gabriel Dec. ¶ 11.

b. Essex Position:

Undisputed that counsel for Essex did not file an objection to the motion for good faith settlement determination, but immaterial. See *Hamilton v. Maryland Casualty Co.*, 27 Cal. 4th 718, 730 (2002) (explaining that good faith settlement determination does not bear on insurance coverage).

c. Trustee's Reply:

Essex's is wrong in its contention that somewhat *Hamilton* protects Essex from the claims assets. As previously noted *Hamilton* is distinguishable and does not support Essex's Position.

Trustee's Response to Essex's Undisputed Facts:

No.	Essex's Contention re Undisputed Facts	Trustee's Response
45.	CMM is a privately held insurance brokerage firm headquartered in Woodland Hills, California.	Undisputed
46.	Prior to its bankruptcy, CMM was operated by Eric and Herbert Rothman.	Undisputed
47.	CMM acted both as an insurance broker and as an agent for carriers, and for certain accounts, CMM would bill the policyholder and deposit the collected funds in the CMM Trust Account.	Undisputed
48.	The amounts in the Trust Account were to consist of only premiums due to insurance carriers for the policies sold by CMM and commissions due	Undisputed

1 to CMM, including the share owed to  
2 the brokers or “producers” under  
3 contract with CMM.

4 49. CMM is allowed to withdraw money Undisputed  
5 from the Trust Account only to pay  
6 premiums to the carriers and to pay  
7 commissions.

8 50. Essex issued Insurance Agents and Undisputed  
9 Brokers Errors and Omissions  
10 Liability Insurance Policy Number  
11 AB 3514 00 to C.M. Meiers, Inc. for  
12 the June 1, 2011 through June 1, 2012  
13 Policy Period (the “Essex Policy”).

14 51. A true and correct copy of the Undisputed  
15 declarations, policy form and  
16 endorsements of the Essex Policy is  
17 attached as Exhibit 1 to Declaration of  
18 Bradley Sharp (Docket No. 13).

19 52. As of December 31, 2000, CMM was Undisputed  
20 insolvent.

21 53. In June 2011, CMM lost an Undisputed  
22 arbitration with a former producer –  
23 Capital Financial Services (“Capital”)  
24 – based, in part, on CMM’s failure to  
25 pay under the terms of a contract.

26 54. CMM was ordered to pay Capital Undisputed  
27 approximately \$445,000 as damages,  
28 as well as \$350,000 in punitive

1 damages, \$786,865.58 in attorney  
2 fees and costs, and \$78,291.88 for  
3 Capital's arbitration fees.

4 55. CMM retained bankruptcy counsel to Undisputed  
5 explore a potential bankruptcy in or  
6 around July 2011.

7 56. In September 2011, CMM began to Undisputed  
8 discuss a sale of assets to Affinity  
9 Global Insurance Services  
10 ("Affinity"), while attempting to  
11 negotiate a settlement with Capital.

12 57. As part of the potential sale of Undisputed  
13 CMM's assets to Affinity, Jason  
14 Adelman of Affinity took over the  
15 operations of CMM.

16 58. In September 2011, CMM stopped Undisputed  
17 paying creditor and former producer,  
18 Jeff Kleid, under the terms of a Stock  
19 Repurchase Note.

20 59. An appraisal of CMM by Strategic Undisputed  
21 Equity Group, updated on November  
22 7, 2011, placed the value of CMM at  
23 negative \$1.4 million.

24 60. An appraisal report from Strategic Undisputed  
25 Equity Group determined that, as of  
26 August 31, 2011, the equity value of  
27 the CMM as a going concern was  
28 \$900,000, and that the debt free

1 working capital of the company was  
2 negative \$1.8 million.

3 61. As CMM was preparing to file Undisputed  
4 bankruptcy in November 2011,  
5 CMM's internal analysis revealed that  
6 is was "out of trust."

7 62. As a result of the "out of trust" Undisputed  
8 situation in November 2011, CMM's  
9 bankruptcy attorney informed CMM  
10 that bankruptcy was "out."

11 63. Following the discovery of the "out of Undisputed  
12 trust" situation and the decision not to  
13 file bankruptcy, Adelman and the  
14 Rothmans began working on a plan  
15 for a sale of CMM to Affinity through  
16 an assignment for the benefit of  
17 creditors ("ABC").

18 64. Both Kleid and Capital filed suit Undisputed  
19 against CMM and threatened to  
20 enjoin the proposed ABC.

21 65. As a result of the threats by Kleid and Undisputed  
22 Capital, Affinity withdrew from the  
23 planned ABC, which necessitated  
24 CMM's bankruptcy filing.

25 66. The Trustee was appointed on Undisputed  
26 January 20, 2012.

27 67. The Trustee's investigation of CMM Undisputed  
28 confirmed that the Trust Account was

1 deficient by over \$1 million, *i.e.* the  
2 records showed that the amounts  
3 CMM owed to the insurance  
4 companies and producers exceeded  
5 the amounts in the Trust Account by  
6 over \$1 million.

7 68. The Trustee has testified that the Undisputed  
8 deficiency in the Trust Account led to  
9 claims by various producers that they  
10 had not been paid by CMM on  
11 commissions they were owed.

12 69. Beginning in 2005, CMM paid Undisputed that legal title in the  
13 \$685,011.79 for rent, mortgage property describe #69 was held in the  
14 payments and a boat slip for a house name of Herbert Rothman.  
15 in Newport Beach, California that was  
16 owned by the Rothmans – not CMM.

17 70. The Trustee's investigation indicated Undisputed  
18 that the Rothmans used up to  
19 \$400,000 in funds from CMM to  
20 furnish the Newport Beach house.

21 71. The day that CMM filed for Undisputed  
22 bankruptcy, the Rothmans approved  
23 the transfer of ownership of a life  
24 insurance policy from CMM to  
25 Herbert Rothman, damaging the  
26 estate by \$80,331.54.

27 72. CMM rented office space in a Undisputed that CMM paid rent to  
28 building owned by a company that an entity owed by the Rothmans.



was owned by the Rothmans, but Disputed as to the characterization  
CMM paid excessive rent for the that Rothman were effecting  
space, effectively funneling “rent” funneling rent paid by CMM to the  
paid by CMM to the mortgage on the mortgage on the Rothman’s  
Rothmans’ building. building. Disputed that the rent was  
in excess of market.

73. Prior to CMM filing for bankruptcy, Deny. The issue of the ownership of  
the Rothmans converted a number of the trust accounts has yet to be  
accounts from “House Accounts” determined by the Court. The Court’s  
belonging to CMM to accounts preliminary decision on this issue was  
belonging to Herbert Rothman. that there was no conversion. Court  
Decision and Order (ECF #: 100  
1:12-bk-10229-MT). A true and copy  
of the Memorandum of Opinion re  
Preliminary Injunction as Against  
Jason Adelman, Affinity Global  
Insurance Services, Herbert Rothman,  
and Eric Rothman is attached hereto  
as **Exhibit “1.”**

74. The Trustee’s analysis indicated the Undisputed as to the Trustee’s view.  
Rothman’s transfers of “House  
Accounts” from CMM took nearly \$2  
million of value from CMM prior to  
the bankruptcy.

75. Brokers left CMM after the Rothmans Admit that the accounts had  
ceded control of CMM to Adelman, approximately \$2 million in  
resulting in an estimated \$2 million in commissions attached to them. Deny  
damage to CMM. as to other allegations.

- 1           76.           A true and correct copy of the           Undisputed  
2                        Response of Bradley D. Sharp  
3                        Chapter 11 Trustee Estate of C.M.  
4                        Meiers Company, Inc. to Defendants  
5                        Jason Adelman and Affinity Global  
6                        Insurance Services' Corrected First  
7                        Set of Interrogatories to Plaintiff-in-  
8                        Intervention Bradley D. Sharp is  
9                        attached as Exhibit C to Essex's  
10                      Appendix of Exhibits.  
11           77.           A true and correct copy of the           Undisputed  
12                        Response of Bradley D. Sharp  
13                        Chapter 11 Trustee Estate of C.M.  
14                        Meiers Company, Inc. to Defendant-  
15                        in- Intervention Herbert Rothman's  
16                        First Set of Interrogatories to  
17                        Plaintiff-in-Intervention Bradley D.  
18                        Sharp is attached as Exhibit B to  
19                        Essex's Appendix of Exhibits.  
20           78.           After his appointment, the Trustee           Undisputed  
21                        joined in an adversary action against  
22                        the Rothmans and Jason Adelman,  
23                        among others.  
24           79.           The Trustee joined in a motion for a           Undisputed  
25                        temporary restraining order to prevent  
26                        the Rothmans from transferring  
27                        CMM's "House Accounts" to Herbert  
28                        Rothman and out of the company.

- 1           80.           On or about August 20, 2012, counsel   Undisputed  
2                   for the Rothmans tendered the  
3                   Trustee's lawsuit against the  
4                   Rothmans to Essex under the Policy.
- 5           81.           By letter dated October 4, 2012,           Undisputed  
6                   Essex denied coverage for the Trustee  
7                   Action.
- 8           82.           A true and correct copy of the           Undisputed  
9                   October 4, 2012 letter from Andrew  
10                  Waxler to Lawrence Jacobson is  
11                  attached as Exhibit 3 to the  
12                  Declaration of Lawrence Jacobson  
13                  (Docket No. 12).
- 14          83.           CMM's Directors and Officers           Disputed.  
15                  ("D&O") carrier, Scottsdale Insurance   Scottsdale originally denied coverage  
16                  Company ("Scottsdale"), accepted the   and then agreed to pay defense costs,  
17                  defense of the Trustee Action.           subject to a reservations of rights.
- 18          84.           A true and correct copy of the           Undisputed  
19                  September 11, 2013 letter from Larry  
20                  Gabriel to Andrew Waxler is attached  
21                  as Exhibit 1 to the Declaration of  
22                  Larry Gabriel (Docket No. 11).
- 23          85.           On September 13, 2013, the           Undisputed  
24                  Rothmans and the Trustee attended  
25                  mediation.
- 26          86.           The Trustee and the Rothmans           Undisputed  
27                  reached a settlement agreement  
28                  totaling \$4.3 million plus an

1 assignment of rights under the Policy,  
2 and the “cash component” of the  
3 settlement was only \$500,000 with  
4 \$475,000 paid by Scottsdale and  
5 \$25,000 paid by the Rothmans.

6 87. The Rothman Agreement expressly Undisputed  
7 provided that the settlement involves  
8 “a variety of different matters that the  
9 Trustee alleges caused CMM and the  
10 CMM bankruptcy estate, monetary  
11 loss,” including: (i) having CMM pay  
12 for the rental and then purchase of a  
13 residence located in Newport Beach,  
14 California; (ii) transferring a life  
15 insurance policy from the Debtor to  
16 Herbert Rothman; (iii) the repurchase  
17 of corporate stock; (iv) failure to  
18 properly manage and maintain  
19 CMM’s premium “Trust Account” in  
20 CMM’s capacity as both an insurance  
21 agent or insurance broker for those  
22 policies it accepted payment of  
23 premiums on; (v) failure to properly  
24 maintain corporate books and records;  
25 (vi) the transfer of CMM’s “house”  
26 accounts to Herbert Rothman  
27 individually, (vii) abandonment of  
28 their management responsibilities

1 over CMM; and (viii) failing to  
2 preserve CMM's assets after it  
3 became insolvent.

4 88. The Trustee testified that the "primary Undisputed  
5 issue" facing CMM at the time of the  
6 bankruptcy was the judgment in favor  
7 of Capital.

8 89. The Trustee testified that, at the time Undisputed  
9 CMM announced it would file for  
10 bankruptcy, the "out of trust" issue  
11 were "rumors."

12 90. In his deposition, the Trustee could Undisputed  
13 not explain why the Rothmans placed  
14 funds in the Trust Account.

15 91. In conjunction with filing for  
16 bankruptcy, Eric Rothman, on behalf  
17 of CMM, stated that CMM was filing  
18 bankruptcy to address the Capital  
19 judgment and the obligation to Kleid.

20  
21 Respectfully Submitted,

22 DATED: November 7, 2014

LARRY W. GABRIEL  
JENKINS MULLIGAN & GABRIEL, LLP

23  
24  
25 By: /s/ Larry W. Gabriel

Larry W. Gabriel  
Special Litigation Counsel for Bradley D. Sharp,  
Chapter 11 Trustee, Estate of C.M.Meiers

FILED & ENTERED

JUN 06 2012

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
BY gonzalez DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO VALLEY DIVISION**

In re:

C.M. Meiers Company, Inc.

Debtor(s).

CHAPTER 11

Case No.: 1:12-bk-10229-MT

Adv No: 1:12-ap-01118-MT

**MEMORANDUM OF OPINION RE  
PRELIMINARY INJUNCTION AS AGAINST  
JASON ADELMAN, AFFINITY GLOBAL  
INSURANCE SERVICES, HERBERT  
ROTHMAN, AND ERIC ROTHMAN**

BTJ Insurance Services, LLC

Plaintiff(s),

v.

Jason Adelman, Affinity Global Insurance  
Services, Herbert Rothman, Eric Rothman

Defendant(s).

Date: May 11, 2012

Time: 8:00 a.m.

Courtroom: 21041 Burbank Blvd., CTRM 302  
Woodland Hills, CA 91367

//

//

//

1  
2 This motion for preliminary injunction raises the difficult intersection of a sale of a  
3 bankruptcy estate's interest in all assets, tangible and intangible, and the rights of  
4 former officers of the debtor corporation to continue pursuing their trade after their  
5 employment with the debtor ceases. Here, Liberty Company Insurance Brokers, Inc.  
6 purchased the ongoing business of the debtor on an "as is, where is" basis, only to  
7 discover that some of the accounts it thought it had purchased were leaving to join the  
8 departed principals of the debtor at a new brokerage business. The question presented  
9 is whether there is a clear showing that a preliminary injunction is warranted where: 1)  
10 former officers and a once stalking horse bidder of the debtor corporation are pursuing  
11 their profession in the same industry as the debtor; and 2) former clients of the debtor  
12 are leaving to follow the former officers and stalking horse bidder. While legitimate  
13 concerns have been raised, the evidence does not warrant a preliminary injunction  
14 against those former officers and their new employer.

## 17 **Background**

18 On April 5, 2012, BTJ Insurance Services, LLC ("Plaintiff") filed an adversary  
19 complaint in C.M. Meiers Company, Inc.'s ("Debtor" or "CMM") chapter 11 bankruptcy  
20 case (the "Complaint"). The Complaint alleges: 1) unfair competition under common  
21 law and California Business and Professions Code § 17200; 2) misappropriation of  
22 trade secrets; 3) intentional interference with contractual relations; and 4) intentional  
23 interference with prospective economic advantage. Complaint, April 5, 2012, ECF No.

24 1.

25 //

26 //

1 Simultaneously, Plaintiff filed a Motion for Temporary Restraining Order and  
2 Order to Show Cause re Preliminary Injunction (the "Motion") as against Jason Adelman  
3 ("Adelman"), Affinity Global Insurance Services ("Affinity"), Herbert Rothman ("Herbert"),  
4 and Eric Rothman ("Eric") (collectively the "Defendants"). Motion, April 5, 2012, ECF  
5 No. 2.<sup>1</sup> On April 16, 2012, the Court denied the request for a temporary restraining  
6 order, and set a continued date for an evidentiary hearing on the preliminary injunction.  
7

8 Plaintiff requests that the Court issue a preliminary junction enjoining  
9 Defendants, their agents, employees, employers, corporations, partnerships, attorneys,  
10 and all other persons acting under, in concert with, or for them:  
11

- 12 1) From using or disclosing any confidential, proprietary information, and trade  
13 secrets formerly owned by Debtor, including without limitation Debtor's list of  
14 its clients' names, addresses, contact information, insurance policy renewal  
15 dates, insurance history, insurance needs and insurance policies (collectively,  
16 the "Confidential Information");
- 17 2) To deliver to Plaintiff all original and copied records Defendants have of  
18 Confidential Information, and Debtor's pricing and quote information, client  
19 communications, information pertaining to clients, vendor communications,  
20 and any other documentation that is a business record of Debtor, and to  
21 prohibit Defendants from making any copies or destroying any such records;  
22 and
- 23 3) To place in constructive trust all monies they have received on or after  
24 February 8, 2012, from insurance carriers and other persons and entities, to  
25 the extent such funds arise from insurance policies placed with customers  
26 who were Debtor's customers as of January 9, 2012, the date Debtor filed its  
27 chapter 11 petition.

28 Motion, April 5, 2012, ECF No. 2.

On April 12, 2012, the Chapter 11 Trustee, Bradley Sharp (the "Trustee") filed a  
Trustee's Joinder to Plaintiff's Motion and Application for Motion to Intervene (the  
"Joinder"). Joinder, April 12, 2012, ECF No. 15. The Trustee contends that the

---

<sup>1</sup> The Motion is brought on the grounds of unfair competition under common law and the California Business and Professions Code § 17200 ("Section 17200"), and misappropriation of trade secrets under the Uniform Trade Secrets Act (the "UTSA") (Cal. Civ. Code § 3426, et seq.).



adversary action may “(a) impact the value of the proceeds from the sale of Debtor’s assets and the value of the estate; and (b) may represent a basis for additional claims by the Trustee against the party defendants, arising out of and relating to their fiduciary obligations owed to the Debtor, the Debtor’s estate and to the creditors of the Debtor.” Joinder, 7:13-7, April 12, 2012, ECF No. 15. Defendants filed oppositions. Adelman and Affinity Opposition, April 16, 2012, ECF No. 17; Rothman Opposition, April 16, 2012, ECF No. 27.

The Court held five days of testimony on the Motion. The following individuals filed declarations: 1) Thomas Leach; 2) Russell Hugenberger; 3) Jason Adelman; 4) Sonia Lee; 5) Carol Dooley; 5) Charlene Hill; 6) James Jackson; 7) David Osterman; 8) Sheldon Goldman; 9) Herbert Rothman; 9) Eric Rothman; 10) Eric Held; 11) Larry Gabriel; 12) Dave Winnert; 13) Richard McLeod; 14) Virginia Scardina; 15) Jerry Pickett; and 16) Marjorie Segale. The following individuals were examined at the hearing: 1) Thomas Leach; 2) Russell Hugenberger; 3) Charlene Hill; 4) Eric Held; 5) Jason Adelman; 6) Eric Rothman; and 7) Herbert Rothman. Cross examination of all other declarants was waived. Having considered all the testimony and admitted exhibits, the Court makes the following findings of facts and conclusions of law under Federal Rule of Civil Procedure 52, applicable in this bankruptcy proceeding under Federal Rule of Bankruptcy Procedure 9014.<sup>2</sup>

//

//

---

<sup>2</sup> To the extent any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. To the extent any party should later assert that this Court may not hear and determine this matter, that party is required to file written objections pursuant to Fed. R. Bankr. P. 9033, and the following shall be considered proposed findings of fact and conclusions of law should the District Court find this Court lacked authority to enter a final ruling.

## Findings of Facts

### 1. The Bankruptcy and Sale of Assets

Debtor was a privately held insurance brokerage California corporation operated by Herbert Rothman as CEO, Dianne Ewing as President and Eric Rothman as Vice President. Debtor filed for relief under chapter of 11 of Title 11 of the United States Code on January 9, 2012. On the same day, Debtor also filed a motion requesting approval of a management agreement between Debtor and Affinity (the "Management Agreement"). The Court approved the Management Agreement on an interim basis, but left final approval of the Management Agreement to a later date.

On January 17, 2012, Debtor filed an Emergency Motion for Order (1) Approving Sale Procedures for the Sale of Estate Property and (2) Setting a Hearing on Motion for Sale of Assets of the Estate. On that same day, creditor Gensar Saleigh and Capital Financial ("Saleigh") filed a Motion for Appointment of Chapter 11 Trustee under § 1104 (the "Trustee Motion").<sup>3</sup> In the Trustee Motion, Saleigh made allegations about Debtor being out of trust approximately \$1.4 million, in violation of the California Insurance Code. Trustee Motion, 8:15, January 17, 2012. Saleigh contended that the out of trust issue warranted the appointment of a chapter 11 Trustee. Saleigh also alleged that Debtor had "lied by omission" on several topics, including the nature of the relationship between it and Affinity.<sup>4</sup>

On January 20, 2012, the Court heard six hours of testimony concerning the appointment of a trustee. William Russ testified that he assisted in determining whether Equitable Solutions, Inc. ("Equitable") would undertake the responsibility of assignee in the pre-petition Assignment for the Benefit of Creditors ("ABC"). His testimony indicated

---

<sup>3</sup> Unless otherwise stated, all section references are made to Title 11 of the United States Code.

<sup>4</sup> Adelman is Affinity's principal; Adelman's sister is married to Eric.

1 that Debtor was in all likelihood out of trust. Evidence on the actual amount out of trust  
2 presented at the hearing was speculative, but it was estimated to be at least \$1 million.  
3 The Rothmans insisted there was no trust account problem and the accounting of  
4 various items was being misconstrued. Although the evidence was preliminary and an  
5 audit had not yet been completed, it was clear that no sale would be credible without  
6 independent oversight. At the conclusion of that hearing, the Court appointed a chapter  
7 11 Trustee under § 1104(a)(2). Bradley Sharp was then selected.

9 Before resolution of the Trustee Motion, Debtor filed its Motion for Approval of  
10 Sale Procedures (the "Sale Procedures Motion") and Motion for Sale of Property under  
11 § 363(b) (the "Sale Motion"). The Sale Procedures Motion proposed to sell all of "the  
12 Debtor's and Debtor's estate's right, title and interest in the Assets." Sale Procedures  
13 Motion, 49:2-3, January 17, 2012, ECF No. 34. Debtor could not continue operating its  
14 business because of a lack of cash flow. The financial concerns were also affecting the  
15 continued employment of producers; Debtor feared that too many producers would  
16 leave. In fact, in the Sale Motion, Debtor alleged that over half of its producers had  
17 already left, mainly as a result of the failed ABC. Sale Motion, 5:12-5, January 19,  
18 2012, ECF No. 54. If no sale transpired, those that remained, it was alleged, would be  
19 without employment within weeks. See Sale Motion, 5:4-7.

22 The Sale Motion listed Affinity as the stalking horse bidder. Saleigh expressed  
23 concern about alleged collusion and family connections between Adelman and the  
24 Rothmans. Decl. of Jason Adelman, 4:4-5, April 16, 2012, ECF No. 19.

26 After his appointment, the Trustee concurred and requested a sale within days.  
27 H'rg, February 1, 2012. There was no showing by any party that Debtor would be able  
28 to continue operating much longer. The Trustee had met with Affinity, and was willing to

1 proceed with a sale, with Affinity serving as the stalking horse bid. A sale on a going  
2 concern basis was necessary to best preserve the bankruptcy estate for the interest of  
3 the creditors. The existing accounts also needed to be serviced and would have to be  
4 switched immediately to another broker if Debtor were shut down. Although it still  
5 needed to be determined which accounts belonged to Debtor and which to individual  
6 producers, Debtor clearly had valuable interests in many house accounts. There was  
7 no time for the Trustee to litigate various producers' claims before the sale had to occur.  
8 On February 1, 2012, the Court set a continued hearing date on the Sale Procedures  
9 Motion and the Motion for Sale for February 3, 2012. There was very little time for  
10 bidders to conduct due diligence, and Affinity agreed to share any and all due diligence  
11 it had completed as a result of the ABC with any potential bidders. No allegations were  
12 raised at the sale that Affinity failed to share such due diligence or that there was lack of  
13 access to conduct due diligence.  
14

15  
16 On February 3, 2012, the Court sold substantially all of the assets of the  
17 bankruptcy estate. The winning bid went to Liberty Company Insurance Brokers, Inc.  
18 ("Liberty"). During the approval of the sale procedures, a great deal of time was spent  
19 clarifying what was, and was not, being sold. H'rg, February 3, 2012. All bidders,  
20 including Liberty, were on notice prior to the sale that the actual assets being  
21 purchased, i.e., books of business, customer lists and commissions, were yet to be  
22 defined; any identification of assets purchased would be determined after the sale. The  
23 Trustee represented that he was only selling Debtor's "right, title and interests." H'rg,  
24 February 3, 2012. The Trustee elaborated, "[i]f ultimately it is determined that either  
25 through agreement or through a process in this Court that C.M. Meiers did not have a  
26 right, title or interest, then I did not sell it." H'rg, February 3, 2012. The Trustee also  
27  
28

1 stated that he needed to review each individual producer employment contract to  
2 determine what books, customers and commissions were actually assets of the  
3 bankruptcy estate. H'rg, February 3, 2012. Finally, the Trustee made clear that the  
4 successful buyer would be required to replenish the out of trust deficit according to the  
5 terms of the Asset Purchase Agreement. H'rg, February 3, 2012. A review of the  
6 docket also made clear that several producers were contesting CMM's right to their  
7 respective books of business. These objecting producers were present at the sale  
8 hearing and discussed their objections immediately preceding the sale itself. H'rg  
9 1:27:22; H'rg 1:38:56.

11 The bidders were on notice, then, that what they were bidding on was an  
12 amorphous set of assets that was to be defined post-sale. Following approval of the  
13 sale procedures, three bidders were willing to proceed: 1) Affinity; 2) Saleigh; and 3)  
14 Liberty. At least one previous potential bidder chose not to bid. Having qualified all  
15 three bidders as required under the sale procedures,<sup>5</sup> the Trustee conducted the  
16 auction. As stated earlier, Liberty was the winning bidder, and no one chose to be a  
17 back-up bidder.

19 Liberty, as the successful bidder, elected to have the purchased assets  
20 transferred to its nominee/designee, Plaintiff. To date, Liberty has paid \$850,000 to the  
21 Trustee, as required under the Sale Order entered by the Court on February 8, 2012.  
22 Liberty has also paid \$650,000 into escrow to be paid out in the future, as measured by  
23 the first year revenue amount. Under the Sale Order, Debtor is entitled to 45% of the  
24 first year's revenue, up to \$650,000. It is this amount that is alleged to be at risk to the  
25 estate as a result of Defendants' purported wrongful conduct. At the time the Motion  
26

28 <sup>5</sup> The sale procedures involving overbids were approved by the Court's Order entered on February 8, 2012. Order Approving Sale Procedures, 2:11-18, February 8, 2012, ECF No. 104.

1 was filed, it was alleged that \$250,000 in first year post-closing revenues had already  
2 been lost, because of Defendants' alleged wrongful conduct. Motion, 7:15-6.

3 On February 8, 2012, the Court entered the Order Granting Motion for Order  
4 Approving the Sale under § 363 (the "Order"). The Order approved the "sale of the  
5 Estate's right, title and interests in and to the Purchased Assets, as defined in that  
6 certain asset purchase agreement." Order 2:7-9, February 8, 2012, ECF No. 105. The  
7 warranty provision of the Asset Purchase Agreement was incorporated within the Order  
8 and reads as follows:  
9

10 4.2 Warranty The Purchased Assets will be sold to Buyer at the Closing as is,  
11 where is, without any warranty or representation of any nature whatsoever as to  
12 the suitability of the Purchased Assets for any intended use, any projection,  
13 result or outcome of any business operation by Buyer using the Purchased  
Assets or any profit loss, expense or income that might result from Buyer's use or  
acquisition of the Purchased Assets.

14 Notice of Final Forms of Asset Purchase Agreement, February 2, 2012, ECF No. 91.

15 Exhibit 1 detailed the "purchased assets" in part as: "(2) All telephone numbers,  
16 directories, customer[ ] lists that C.M. Meiers has the right to use or otherwise owns..."

17 Notice of Final Forms of Asset Purchase Agreement, ECF No. 91.

18 The Order and Asset Purchase Agreement each reiterate what was discussed for  
19 over forty minutes at the sale procedure hearing. Mainly, the assets of the estate that  
20 were subject to the sale were yet to be clearly defined. The customer list was to be  
21 defined as the Trustee examined each individual producer contract and book of  
22 business, either by agreement or through further litigation. With that knowledge, Liberty  
23 assented to the purchase of the assets on an "as is, where is" basis.  
24  
25

26 //

27 //

28 //

2. Eric and Herbert Rothman's Employment

Eric and Herbert Rothman (collectively the "Rothmans") were the two principals of Debtor on the day of relief under chapter 11. Eric was an 11% shareholder and Herbert was an 89% shareholder in Debtor. Herbert began his employment with Debtor in 1963. Eric commenced his employment with Debtor in 1997 as a producer. Despite their history of actual employment, the earliest employment agreement, for both, did not make it to paper until January 1, 2009. See Exhibit 22; Exhibit 47.

a. Herbert's Employment Agreement

On January 1, 2009, Herbert executed a Producer Employment Agreement with Debtor. Exhibit 22. The Agreement contained an exclusivity provision, requiring Herbert to devote his services solely to CMM, which did not survive termination of the employment. See Exhibit 22, ¶23.5. What did survive termination, are the following pertinent provisions:

8. Confidential Information. "Confidential Information" means information belonging to C.M Meiers, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and that is the subject of reasonable efforts under the circumstances to maintain its secrecy. **Confidential information does not include identities, contact information, contracts, and pricing of, or relating to, clients originated and/or serviced by Employee before or after the Effective Date of this Agreement ("Non-Confidential Information"). Employee may use Non-Confidential Information for any lawful purpose after the Employment Relationship ends.**

9. Non-Disclosure. Employee acknowledges and agrees that all Confidential Information is maintained as a trade secret and is the sole and exclusive property of C.M Meiers or C.M Meier's clients, as applicable. Employee agrees to hold in strict confidence and trust all Confidential Information, and not to reveal, report, published, disclose or transfer, directly or indirectly, any Confidential Information to any person or entity, and not to acquire or utilize any Confidential Information for any purpose other than the Employment Relationship.

...

11. Return of Property and Confidential Information. Upon the request of C.M Meiers, Employee will promptly deliver all originals and copies of Confidential Information. Employee will not keep any materials containing Confidential Information following termination of employment. Employee will return all equipment, software, keys, access cards, files and other property belonging to C.M Meiers promptly upon termination of the Employment Relationship or at any time at C.M Meiers'[] request.

...

13. Restrictions on Competition. Employee acknowledges that (i) the identities of, and other information regarding, past, current, and prospective clients and business partners of C.M Meiers are confidential and proprietary and may constitute trade secrets under applicable law[] (ii) their identities and such information are not generally known[] (iii) C.M Meiers uses reasonable efforts to maintain the confidentiality of such identities and information; (iv) C.M Meiers expends substantial time and resources to obtain and maintain relationship with its past[,] current, and prospective clients and business partners and (v) due to the unique nature of C.M Meiers[] business relationships, contracts, and industry, the restrictive time periods in this Agreement are reasonable and necessary. Accordingly, Employee agrees, to the extent permitted by applicable law, that Employee **will not**, at any time, without the prior written consent of C.M Meiers, **solicit** any of the past, current, or prospective clients or business partners of C.M Meiers to do business with any person or entity whose business competes with the business of C.M Meiers, **to the extent that the identity of, or other information regarding, such client or business partner constitutes a trade secret of C.M Meiers under applicable law or to the extent that such solicitation involves acquisition, disclosure, or use of Confidential Information**.

Exhibit 22 (emphasis added).

b. Eric's Employment Agreement

Eric had a similar Producer Employment Agreement drafted, which was examined during his testimony. Eric's Producer Employment Agreement contained identical provisions 8, 9, 11, 13, and 23.5. Although this agreement was never signed, it provides context for what CMM and Eric considered trade secrets or confidential information.

c. Termination

On February 4, 2012, the Trustee informed the Rothmans that their employment with Debtor was terminated, effective February 6, 2012. Decl. of Herbert Rothman, 5:5-7, April 16, 2012, ECF No. 28; Decl. of Eric Rothman, 4:26-8, April 16, 2012, ECF No.



29. On February 13, 2012, both joined Affinity as independent consultants. Decl. of Herbert Rothman, 2:26-7; Decl. of Eric Rothman, 2:22-3. Both were also subsequently offered employment by Liberty, but both declined. Decl. of Herbert Rothman, 6:20; Decl. of Eric Rothman, 6:10.

Following his termination, Eric testified that he deleted the Outlook files that had been created with Dave Winnert's help in early January 2012. H'rg, May 8, 2012. Dave Winnert, employed at CMM as the Network Administrator for information technology, declared that he assisted Eric and Herbert in creating copies of all of their CMM emails and contacts in their CMM Outlook computer program ("Outlook files"). Decl. Dave Winnert, 2:9-11, April 19, 2012, ECF No. 48. Winnert declared that this information was copied to an external hard drive.

Eric testified that although he did not return the Outlook files themselves, because they were located on his personal computer, he did in fact delete them upon termination. H'rg, May 8, 2012. When asked about the return of other property, such as equipment, software, keys, access cards, files, other property belonging to Debtor, Eric testified that he returned files and his key card, and that other things were later mailed to him by the Trustee. H'rg, May 8, 2012. Plaintiff did not present any evidence contradicting Eric's testimony about deleting the Outlook files upon his termination. Eric's testimony, however, was not persuasive in all respects as it is a rare professional who would purposefully delete a contact list that may also contain many personal contacts. The Court finds only that the Outlook files were not used to solicit clients.

One final piece of property was left unexplained. Herbert had a cell phone at CMM, and CMM paid the phone bill each month. Herbert took that phone with him and put that phone number on the tombstone announcement he sent out after his move to

1 Affinity. This is potentially a diversion of CMM's property, because BTJ purchased "all  
2 telephone numbers...that C.M Meiers has the right to use or otherwise own. . . ." Who  
3 purchased the phone and whether it or the phone number was CMM's property was  
4 never shown. Herbert was a credible witness and returned all CMM property when he  
5 left on February 6, 2012. Although CMM paid the monthly phone bill, there was no  
6 indication whether this was an employment benefit or whether it was paid because  
7 CMM owned the phone number. Nobody appears to have asked Herbert to return the  
8 phone, and he seems to consider it his personal phone and number. Should further  
9 investigation show otherwise, the diversion of the phone number can still be pursued.  
10  
11 See, e.g., In re Aqua Clear Technologies, 361 B.R. 567, 575 (Bankr. S.D. Fla. 2007).

### 12 3. Back-up Tapes

13  
14 Certain back-up Tapes of the AMS 360 system, containing confidential  
15 information about certain customers and policy information, were in Eric's possession.  
16 Russell Hugenberger, IT Manager for CMM through March 15, 2012, testified about his  
17 involvement in the maintenance, and backing up, of the AMS 360 system used by  
18 Debtor.<sup>6</sup> H'rg, April 20, 2012. The AMS 360 system is a customer database that  
19 allowed Debtor to maintain personal information, correspondence and policies for all of  
20 its customers. H'rg, April 20, 2012. Hugenberger explained that there are two different  
21 kinds of AMS 360 systems, an online and in-house version. H'rg, April 20, 2012. The  
22 online version is stored at Vertafore's data centers and the in-house is stored locally at  
23 the respective company. H'rg, April 20, 2012. CMM used an in-house version. H'rg,  
24 April 20, 2012. Affinity uses the on-line system. Decl. of Eric Rothman, 10:3-4. Data  
25 from the AMS in-house system at CMM was extracted and backed up on tapes. H'rg,  
26  
27

28  
<sup>6</sup> Hugenberger also was involved with maintenance and back up of the AFW system, the precursor to the AMS system.

1 April 20, 2012. External harddrives would be sent to Vertafore whenever a producer left  
2 and wanted the account information that was part of that producer's book of business.  
3 Vertafore would then extract the information on the hard drive so that the producer  
4 could take the information with them. H'rg, April 20, 2012.

5  
6 Back-up tapes were prepared regularly at the end of the year. H'rg, April 20,  
7 2012. The back-up tapes were regularly taken off-site to ensure the AMS 360 system  
8 and data was retrievable in the event of any destruction of the system. H'rg, April 20,  
9 2012. Additionally, weekly back-up tapes were prepared and also taken off-site. H'rg,  
10 April 20, 2012. On December 31, 2011, Hugenberger gave Eric a burgundy tape and  
11 about four or five blue tapes. H'rg, April 20, 2012. The burgundy tape contained the  
12 AMS 360 system back-up and the blue tapes contained the file server back-ups. H'rg,  
13 April 20, 2012. Hugenberger testified that there was nothing out of the ordinary in the  
14 back-up tapes that were prepared on December 31, 2011 and handed to Eric. H'rg,  
15 April 20, 2012.

16  
17 On January 3, 2012, the first work day of the new year, the storage array, i.e. the  
18 server, crashed. H'rg, April 20, 2012. Two of the eight drives failed. H'rg, April 20,  
19 2012. At that point, and as a result of the failed server, Hugenberger contacted Eric so  
20 that he could return the back-up tapes. H'rg, April 20, 2012. These tapes were then  
21 used to restore the server. H'rg, April 20, 2012. The information saved on the back-up  
22 tapes remained on the tapes after they were used to restore the server. H'rg, April 20,  
23 2012. They were returned to Eric on or about January 9, 2011. H'rg, April 20, 2012.

24  
25 Eric testified that after the back-up tapes were back in his possession, he did not  
26 return them to storage because of the bankruptcy. H'rg, April 20, 2012. In short, the  
27 bankruptcy preoccupied his time and efforts. Eric had the motive and opportunity to  
28

1 copy or use the information on the back-up tapes to solicit CMM customers.  
2 Hugenberger testified that the back-up tapes could have been converted to comport  
3 with Affinity's database, but Eric credibly testified that he only became aware of this fact  
4 while listening to Hugenberger testify. H'rg, April 20, 2012. There was no evidence  
5 showing that Eric, or any other Defendant, remains in possession of these back-up  
6 tapes or that these tapes were used to create a new client list by Defendants.  
7

8 Although it is still a mystery where the back-up tapes are, Vertafore was never  
9 subpoenaed to show the tapes were converted to be compatible with Affinity's AMS  
10 system. To the contrary, the back-up tapes appear to have been a regularly planned  
11 data protection system that ended up being necessary a few weeks later when the  
12 system failed.  
13

#### 14 4. Recoded House Accounts

15 On December 30, 2011, Eric asked Hugenberger to re-code all Debtor house  
16 accounts for active customers to accounts in Herbert's name, as the executive in charge  
17 of and producer thereof. Eric also instructed Hugenberger to recode around 900  
18 accounts in Cathy Kerhulas' name to house accounts. Cathy Kerhulas was the Senior  
19 Vice-President of Commercial and Entertainment at CMM. H'rg, April 20, 2012. Plaintiff  
20 presented these allegations as further evidence of an intent to take CMM clients from  
21 Debtor's estate to Affinity.  
22

23 Hugenberger declared that Debtor put codes on its customers' insurance policies  
24 and accounts. Motion, 2:6. This coding was used in part to determine whether a  
25 specific person, i.e., producer, was entitled to a portion of the commissions Debtor  
26 received from insurance carriers on the related insurance policy. Motion, 2:6-9. One  
27 set of accounts was coded as "house accounts." Hugenberger's understanding about  
28

1 the house accounts was that they represented a general account for the company that  
2 belonged to the “house” or that were not credited to a specific producer or employee,  
3 although the purpose for the coding was outside of Hugenberg’s responsibility and  
4 duties. H’rg, April 20, 2012. Hugenberg declared that at the end of 2011 Debtor had  
5 “thousands of accounts coded as ‘house’ accounts.” Decl. of Russell Hugenberg, 2:9-  
6 10. On December 31, 2011, Hugenberg conducted a global re-coding. H’rg, April 20,  
7 2012. In January 2012, Hugenberg conducted a second re-coding due to computer  
8 problems with the first round. H’rg, April 20, 2012.

9  
10 Eric testified that certain accounts were re-coded as a “house keeping matter” so  
11 that Equitable would know what was being assigned through the ABC. H’rg, May 8,  
12 2012; Decl. of Eric Rothman, 15:7-11. Eric testified that CMM’s attorney, during the  
13 planning for the ABC, informed him that everything had to be “clean” going forward on  
14 the ABC. H’rg, May 8, 2012. On this instruction, Eric testified that he instructed  
15 Hugenberg to re-code all “house accounts” to his father’s name and all of Cathy  
16 Kerhulas accounts to house accounts. H’rg, May 8, 2012. Cathy Kerhulas had  
17 resigned sometime in November 2011 and those accounts should have been recoded  
18 to house accounts at that time, per common practice at CMM. Decl. of Eric Rothman,  
19 15:19-22. Eric further testified that, but for the bankruptcy filing, they would have  
20 ultimately re-coded some accounts that were in Charlene Hill’s name, but that she did  
21 not “own.” H’rg, May 8, 2012.

22  
23 Eric was adamant, while testifying, that re-coding did not establish or change  
24 ownership. H’rg, May 8, 2012. Eric was credible in his testimony, but was evasive  
25 when addressing whether coding established or somehow helped determine ownership.  
26 Although Eric was vague about the effect re-coding had on ownership, no evidence was  
27  
28

1 presented showing that Debtor lost ownership of these accounts or customers in late  
2 2011 or early 2012. Although certain customers left post-sale, no evidence was  
3 presented showing that the re-coding had anything to do with the change in brokers.

4 Thomas Leach ("Leach"), Liberty's President and manager for Plaintiff, admitted  
5 that this coding was also a potential management system and that most of the accounts  
6 remained at Liberty, or Plaintiff. Leach testified that he had not checked on what  
7 revenue was still with Plaintiff or Liberty as part of these recoded accounts. He also  
8 agreed that just because an account is recoded does not mean that the account has  
9 been taken.  
10

11 It is unclear whether the recoding was an attempt to maintain commissions once  
12 Affinity took over the assets in the ABC or whether it was truly an accounting correction  
13 to "clean things up." This lengthy list of customers has not left, and the Rothmans have  
14 not claimed them as their book of business. To the extent there was even any  
15 preparation for a diversion of CMM house accounts, it was not completed. As an ABC  
16 had been planned, and preparations were underway for some time until the ABC was  
17 suddenly aborted, the motive behind preparation activities is harder to define.  
18  
19

## 20 5. Deleted Emails

21 While doing routine file maintenance, Hugenberger discovered that Herbert  
22 deleted emails from his Outlook files. All deleted incoming emails, received between  
23 August 29, 2011 and December 29, 2011, were permanently deleted at some point after  
24 December 29, 2011. All sent emails for that same period were not deleted.  
25 Hugenberger normally had been the one to clean up Herbert's Outlook files, and he had  
26 not deleted any 2011 files for Herbert. Based on Hugenberger's past interactions with  
27 Herbert, Hugenberger did not think that Herbert had the expertise to permanently delete  
28

1 the deleted files himself. The deletion of this huge swath of emails all at once was not  
2 adequately explained, but the sent folder was shown to still be available and none of  
3 that information was presented to the Court. There was no evidence illustrating that  
4 these deleted Outlook files indicate anything in particular.

5  
6 6. Transferred Life Insurance

7 The Trustee introduced evidence that the board of directors transferred a life  
8 insurance policy that CMM held on Herbert into his name on the day the bankruptcy  
9 was filed. H'rg, May 11, 2012. The transfer resolution was signed by Eric. Herbert  
10 testified that it had not been cashed in, and was still in force. H'rg, May 11, 2012. Eric  
11 defended this action by stating that CMM was not the owner of the policy because it  
12 was not a beneficiary. Eric testified that the beneficiary for the last nine years was the  
13 Rothman Revocable Trust. The Trustee contended that although CMM was not a  
14 beneficiary, it was the owner of the policy. The life insurance policy had a total gross  
15 accumulation value of \$78,540.61; no consideration was given in exchange for the  
16 transfer of the policy.  
17

18  
19 This issue may indicate a plan to salvage assets of CMM for personal gain, but  
20 the nature of the transfer and the value to CMM was not clear enough from the  
21 evidence to draw any firm conclusions at this time. This evidence, combined with the  
22 re-coding of accounts, deletion of emails and Outlook Files copied could indicate  
23 planning for an eventual transfer of CMM assets to the Defendants personally. Had  
24 there actually been evidence of improper transfers post-petition or post-sale, the  
25 probative value of these actions would be greater; without such evidence, the Court  
26 cannot, at this point, determine what these actions show.  
27

28 //

1       7. Events Post-Sale

2       Plaintiff argued that Defendants were soliciting CMM customers, and that these  
3 customers were changing brokers to Affinity in response to the solicitation.

4               a. Broker of Record Letters

5       On March 2, 2012, Plaintiff BTJ alleged that it received twenty-one letters, all  
6 from CIBA Insurance Services. Motion, 9:17-8. These letters, dated February 13,  
7 2012, stated that certain specific customers were changing their insurance broker of  
8 record from CMM to Affinity, effective immediately. Motion, 9:18-9; Exhibit 40. The  
9 letters all related to insurance policies that were up for renewal on March 31, 2012.  
10 Motion, 9:25-6. Written notice of a broker change was due by February 15, 2012.  
11 Motion, 9:26-7. This information was generally known in the insurance industry.

12       About 20 broker of record letters (“BORs”) were introduced as evidence in an  
13 attempt to show the solicitation and taking of certain CMM customers. Exhibit 40. On  
14 February 13, 2012, Eric assisted some of these clients in drafting the BORs. H’rg, May  
15 8, 2012. He stated that each of these accounts and customers were accounts and  
16 customers “originated or served by [him] while [he] was employed by [Debtor].” Decl. of  
17 Eric Rothman, 8:19-22. He also testified that his assistance was provided after the  
18 customers had contacted him expressing an interest in changing brokers. H’rg, May 8,  
19 2012.

20       Three former CMM clients filed declarations: 1) Sheldon Goldman; 2) David  
21 Osterman; and 3) James Jackson (the “Declarants”). Decl. of James Jackson, April 16,  
22 2012, ECF No. 23; Decl. of David Osterman, April 16, 2012, ECF No. 24; Decl. of  
23 Sheldon Goldman, April 16, 2012, ECF No. 25. These former CMM customers declared

24  
25  
26  
27  
28    //



1 that they reached out to the Rothmans upon discovering that they had left CMM. They  
2 also stated that they were not solicited by the Rothmans.

3 In fact, when asked about the BORs, and where those addresses were obtained,  
4 Eric testified that he obtained the addresses from a list of his fraternity brothers, his  
5 2002 wedding list, his father's square dancing roster from 1997, or from Herbert and his  
6 wife's personal address book. Exhibit 53; Exhibit 54; Exhibit 55; Exhibit 56. After a few  
7 specific examples of cross-referencing between the BORs and the alleged source, e.g.,  
8 Exhibit 53-55, the parties stipulated that certain addresses on the BORs were also  
9 found on the summary chart submitted as Exhibit 57. H'rg, May 11, 2012. The  
10 summary chart listed certain customers, the customer representative and the customer  
11 relationship. The customer relationship column listed the source from which the  
12 address and contact information was obtained. Upon review, the Court confirmed that  
13 all but two customers could be found within the lists of the Rothmans' personal  
14 contacts.<sup>7</sup> The representative for these two customers is Valerie Hillas. Eric testified  
15 that she was an associate of his father's and that she was not solicited. The Rothmans  
16 have long standing relationships with many of the customers, or their representatives,  
17 that have now chosen to follow them.

18 One customer by the name of Doc Johnson was actually owned by the  
19 Rothmans. When asked on cross-examination, Leach testified that he had not known  
20 that the Rothmans were the owners. It is unclear why Plaintiff chose to include Doc  
21 Johnson as a customer that had been wrongfully solicited by Defendants.

22 Finally, not all customers left for Affinity or the Rothmans. Many customers  
23 followed producers to other brokerage firms.

24  
25  
26  
27  
28  

---

<sup>7</sup> This conclusion excludes three customers. These three customers filed the declarations discussed above.

1                   b. Liberty Letter

2                   Sometime after the Court entered its orders approving the sale procedures and  
3 the Sale Motion on February 8, 2012, Liberty sent out a letter to certain customers and  
4 carriers letting them know that they had purchased Debtor's assets and were now the  
5 coded producer. They also stated that there were certain covenants imposed as  
6 against former Debtor's owners and employees preventing them from soliciting their  
7 business. Exhibit 3 to Decl. of Eric Rothman, April 16, 2012, ECF No. 30. Defendants  
8 allege the following statements evidence wrongful conduct on Plaintiff's part:  
9

10                   It has come to [Liberty's] attention that the past owners and employees [of  
11 Debtor] are in direct violation of [covenants forbidding them from possessing or  
12 using any trade secret or confidential information of Debtor's] and have been  
13 contacting carriers and clients to secure broker of record letters, using data that  
14 was absconded from [Debtor].

15                   The previous owners of [Debtor] have contacted numerous carriers  
16 attempting to get new appointments for Affinity Global, in spite of the fact that  
17 they left behind an agency estimated to be \$1 million out of trust and are  
18 currently under investigation by the Enforcement Branch of the California  
19 Department of Insurance.

20                   Eric states that there is no basis for these allegations on Liberty's part, and that  
21 this is contradicted by their offer of employment. Liberty having offered him, and his  
22 father, employment might go to show Liberty's interest in preserving Rothmans'  
23 reputation, name and perhaps even contacts. The Court cannot make a finding as to  
24 the underlying motives behind Liberty's employment offer, and it appears that this may  
25 have been part of settlement negotiations.  
26

27                   The letter was not approved by the Trustee. There is no evidence that there is  
28 an actual investigation underway by the Department of Insurance. Whether the  
statements in the letter were true must be left for another day.

//

//

1 c. Tombstone Announcement

2 On April 12, 2012, “tombstone” announcements were sent to various customers  
3 that were listed in the CMM base purchased by Liberty. The Rothmans each sent out  
4 tombstone announcements. Exhibit 60; Exhibit 61. Charlene Hill also sent out  
5 tombstone announcements after commencing her employment with Affinity. Decl. of  
6 Charlene Hill, 4:4-5, April 16, 2012, ECF No. 22. Her tombstone announcement is not  
7 dated, but simply states that she “has joined the team at Affinity Global Insurance.” A  
8 telephone, mobile and fax number, and her email are also listed. Affinity’s logo and  
9 name also are prominently displayed. On all of the announcements, there is no  
10 language discussing business, or a change in broker. The tombstone announcement is  
11 a generic flyer and does not appear to be addressed to one specific customer.  
12

13  
14 Plaintiff did not show that the tombstone announcements were soliciting  
15 business. Although they were sent out to former CMM customers, there was no  
16 evidence indicating that the tombstone announcements were discussing anything other  
17 than a change in employment. It was undisputed that tombstone announcements are  
18 common practice in the insurance industry.  
19

20 d. Composition of Client List While Working at Affinity

21 The Rothmans began their employment at Affinity on February 13, 2012. Decl.  
22 of Eric Rothman, 11:3. When they joined, they were instructed not to “take, bring or  
23 use” any confidential or trade secret information belonging to Debtor. Adelman  
24 explained that he had them sit down with Melody Schwartz and run through a checklist  
25 and orientation to ensure that no property, confidential information or trade secrets of  
26 CMM were brought to Affinity. This was done with each person that was hired by  
27 Affinity. A checklist, entitled Affinity Global Insurance New Hire Screening Checklist –  
28

1 Confidential Information and Trade Secrets, was included as Defendant's Exhibits 12  
2 and 15. Items on the checklist included:

- 3 • Ensure that employee/contractor does not possess any property of former  
4 employer;
- 5 • Review documents from former employment relating to confidentiality, trade  
6 secrets, competition, and solicitation; and
- 7 • Discuss extent to which confidential information from former employer may  
8 qualify for trade secret protection.  
9

10 Defendant's Exhibit 12; Defendant's Exhibit 15.  
11

12 Eric stated that he had not solicited any of Debtor's clients, nor undertaken acts  
13 to have them move their business. Decl. of Eric Rothman, 10:22-27. Eric clarified later  
14 that he did not initiate any communication with CMM clients, but once contacted and  
15 prompted by CMM clients he would begin to discuss business and a change in broker.  
16 No evidence was presented showing that Eric initiated any business communication  
17 with any of CMM's, now BTJ's, former clients. Eric did, however, testify that upon his  
18 employment at Affinity he began to compile a list of potential clients using the white  
19 pages, a fraternity contact list, his wedding guest list, his father's square dancing roster  
20 and Herbert's and his wife's personal address book. Exhibit 59; Exhibit 53; Exhibit 55;  
21 Exhibit 54; Exhibit 56. Eric also testified, and Adelman confirmed, that cold calls were  
22 made in efforts to compile a new client list.  
23

24 Despite the belief held by Thomas Leach – that customer lists, contact  
25 information and policy information are confidential – there was testimony addressing the  
26 fact that information found via public resources can not, and is not, considered  
27 confidential. H'rg, May 1, 2012. Certain information, e.g., renewal dates, appears to be  
28

1 common knowledge or readily available via public resources within the industry. H'rg,  
2 May 1, 2012. There was credible testimony by Adelman stating that all information  
3 acquired during the due diligence by virtue of the ABC was destroyed after the sale of  
4 the assets to Liberty. H'rg, May 1, 2012.

5  
6 Leach seemed to believe that Defendants could not contact CMM's clients,  
7 because "they should not be speaking to the clients that [Plaintiff] purchased...pretty  
8 much ever." H'rg, April 20, 2012. Upon further cross examination, however, Leach  
9 admitted that Plaintiff did not purchase any clients in perpetuity. H'rg, April 20, 2012.  
10 He admitted that the client is free to decide to leave CMM, or Plaintiff, but that  
11 Defendants should not be reaching out to them.

12  
13 After admitting that just because the AMS files were re-coded, they were not  
14 necessarily stolen, and that certain policy renewals are well known to people in the  
15 industry, Leach surprisingly admitted that he had no evidence that Affinity obtained  
16 CMM clients through unlawful means. H'rg, April 20, 2012. He also admitted that he  
17 was only guessing that some of the CMM business he saw leaving in the last two  
18 months went to Affinity. H'rg, April 20, 2012. Despite any proof that there was improper  
19 solicitation, or any guarantee any client would stay with Plaintiff after the purchase,  
20 Leach insisted that, "[w]e just know that they took the business." H'rg, April 20, 2012.

## 21 **Conclusions of Law**

### 22 **1. Legal Standard**

23  
24 In order to obtain a preliminary injunction under Fed. R. Civ. P. 65 ("Rule 65"),  
25 incorporated by reference in Fed. R. Bankr. P. 7065, Plaintiff must establish that: 1) it is  
26 likely to succeed on the merits; 2) it is likely to suffer irreparable harm in the absence of  
27 preliminary relief; 3) the balance of equities tips in its favor; and 4) that an injunction is  
28

1 in the public interest. Winter v. Natural Resources Defense Counsel, Inc., 555 U.S. 7,  
2 20 (2008); Munaf v. Geren, 553 U.S. 674, 689-90 (2008). A preliminary injunction is an  
3 “extraordinary and drastic remedy” that should not be awarded as of right. Munaf v.  
4 Geren, 553 U.S. 689; Winter, 555 U.S. 26.

5  
6 The moving party bears the burden of persuasion to show that it is entitled to  
7 relief by a clear showing. 11A Federal Practice and Procedure § 2948 (Wright, Miller  
8 and Kane 2d 1995); Winter, 555 U.S. 22. The burdens at the preliminary injunction  
9 stage track the burdens at trial. Gonzales v. O Centrol Espirita Uniao de Vegetal, 546  
10 U.S. 418, 429 (U.S. 2006). Once the moving party has carried its burden of showing a  
11 likelihood of success on the merits, the burden shifts to the non-moving party to show a  
12 likelihood that its affirmative defense will succeed. Perfect 10, Inc. v. Amazon.com, Inc.,  
13 508 F.3d 1146, 1158 (9th Cir. 2007).

14  
15 a. Likely to Succeed on the Merits

16 Likelihood of success has been defined as “more likely than not.” Tital Tire Corp.  
17 v. Case New Holland, Inc., 566 F.3d 1372, 1379 (8th Cir. 2009). The underlying merits  
18 at issue here are unfair competition under common law and § 17200, and  
19 misappropriation of trade secrets under the UTSA. In short, Plaintiff must show that it is  
20 more likely than not to succeed on the merits of an unfair competition or  
21 misappropriation of trade secrets cause of action under California law.

22  
23 1) Misappropriation of Trade Secrets

24 Under the UTSA, a trade secret is defined as “information, including a formula,  
25 pattern, compilation, program, device, technique, or process, that: (1) derives  
26 independent economic value, actual or potential, from not being generally known to the  
27 public or to other persons who can obtain economic value from its disclosure or use;  
28

1 and (2) is the subject of efforts that are reasonable under the circumstances to maintain  
2 its secrecy.” Cal Civ. Code. § 3426.1. A customer list has been held to have economic  
3 value when the secrecy of the information provides a business with a ‘substantial  
4 business advantage.’” Morlife, 56 Cal. App. 4<sup>th</sup> 1522.

5  
6 The first question here is whether the Confidential Information purchased by  
7 Liberty from Debtor constitutes a trade secret. Presently, the customer list itself  
8 remains to be enumerated as individual producers still seem to be filing objections. At  
9 this point, and solely for purpose of the preliminary injunction, the Court will limit its  
10 analysis to the customers specifically addressed in the papers filed in this case, and will  
11 assume that any other customers in the CMM database not already specified as  
12 belonging to a departed producer belong to CMM.

13  
14 California courts have been “reluctant to protect customer lists to the extent they  
15 embody information which is ‘readily ascertainable’ through public sources, such as  
16 business directories. Morlife, Inc. v. Lloyd Perry, 56 Cal. App. 4<sup>th</sup> 1514, 1525 (Cal. Ct.  
17 App. 1997); American Paper & Packaging Products, Inc. v. Kirgan, 183 Cal. App. 3d  
18 1318, 1326 (Cal. Ct. App. 1986). Such readily obtainable information is distinguished  
19 from customer lists that have been compiled by an employer who has “expended time  
20 and effort identifying customers with particular needs or characteristics.” Morlife, 56  
21 Cal. App. 4<sup>th</sup> 1521. Courts will prohibit an employee from using the latter to solicit and  
22 enter the market.

23  
24 There was credible testimony and evidence showing that Defendants compiled a  
25 new customer list from sources not attributed to “expended time or efforts” on the part of  
26 CMM. Here, Defendants relied on Eric’s wedding lists, Eric’s fraternity list, Herbert’s  
27  
28 //

1 square dancing roster, Herbert's and his wife's personal address book, white pages,  
2 and cold calls.

3 Even assuming the information utilized by Defendants to pursue their future  
4 venture constituted a trade secret, there still would need to be misappropriation of this  
5 information. The evidence failed to demonstrate that Defendants misappropriated trade  
6 secrets.<sup>8</sup>

7  
8 The argument is that by re-coding accounts, sending out tombstone  
9 announcements, assisting in broker of record letters, and by using the customer lists  
10 and policy information to contact previous customers, Defendants have solicited Liberty  
11 clients in violation of UTSA. To solicit means to "appeal to (for something); to apply to  
12 for obtaining something; to ask earnestly; to ask for the purpose of receiving..." Morlife,  
13 56 Cal. App. 4th 1525. Courts have held that, "merely informing customers of one's  
14 former employer of a change of employment, without more, is not solicitation." Morlife,  
15 56 Cal. App. 4th 1525; Hilb, Rogal and Hamilton Insurance Services of Orange County,  
16 Inc. v. Stanley R. Robb, 33 Cal. App. 4th 1812, 1821 (Cal. Ct. App. 1995).  
17  
18

19 <sup>8</sup> Under the UTSA, misappropriation is defined as the:

- 20 (1) [a]cquisition of a trade secret of another by a person who knows or has reason to know that  
21 the trade secret was acquired by improper means; or  
22 (2) [d]isclosure or use of a trade secret of another without express or implied consent by a person  
23 who:

- 24 (a) Used improper means to acquire knowledge of the trade secret; or  
25 (b) At the time of disclosure or use, knew or had reason to know that his or her  
26 knowledge or the trade secret was:  
27 (i) Derived from or through a person who had utilized improper means to acquire  
28 it;  
(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or  
limit its use; or  
(iii) Derived from or through a person who owed a duty to the person seeking  
relief to maintain its secrecy or limit its use; or  
(c) Before a material change of his or her position, knew or had reason to know  
that it was a trade secret and that knowledge of it had been acquired by accident or  
mistake.

Cal Civ. Code. § 3426.1.



1 Upon invitation by another, a defendant's willingness to discuss business does  
2 not constitute solicitation. Id. An employee, who has left his employer, is within his right  
3 to send out notices of changed employment or, as in this case, tombstone  
4 announcements. California courts have held that, "the right to announce a new  
5 affiliation, even to trade secret clients of a former employer, is basic to an individual's  
6 right to engage in fair competition." This has been held to be true even in cases  
7 involving non-compete clauses. See Morlife, 56 Cal. App. 4th 1514.

9 Plaintiff alleged that Defendants misappropriated the customer list and policy  
10 information in order to solicit business that is allegedly rightfully Plaintiff's by virtue of  
11 the sale. Plaintiff needed to show that Defendants improperly took assets of the estate  
12 and that the assets constituted trade secrets.<sup>9</sup> Although Plaintiff showed an opportunity  
13 to misappropriate, and possibly the preparation for misappropriation, the evidence  
14 presented is also consistent with actions necessary for the preparation of an ABC.  
15 Also, although the Court finds that Eric was in possession of the AMS back-up tapes  
16 around the time of the bankruptcy filings, and that accounts were re-coded, Plaintiff did  
17 not show that Defendants used the back-up tapes during the compilation of the  
18 customer list or during the change in brokers. There was no evidence showing that the  
19 information on the back-up tapes was converted to be compatible with Affinity's online  
20 AMS system. Finally, there was no evidence showing that the Outlook files were used  
21 to contact the customers that eventually switched brokers.

24 Thus, even if the Court were to find that that the customer list and policy  
25 information constitutes confidential information, i.e., trade secrets, Defendants, have the  
26

27 <sup>9</sup> Whether former officers of the debtor breached any fiduciary duties before they left debtor's employ is a  
28 question not directly raised by the terms of the injunction sought, and no finding on that issue is made.  
See, e.g., In re D.C. Sullivan & Co. 685 F.2d 729, 737 (1<sup>st</sup> Cir. 1982) (breach of fiduciary duty to bring  
customer accounts to competitor to save officer's job)

1 right to send out tombstone letters, use public resources to contact customers, and  
2 discuss business upon invitation by a customer. Most of the evidence presented  
3 showed that former CMM customers contacted the Rothmans upon discovering that  
4 they had left CMM. Upon discovery of this news and upon explanation by the  
5 Rothmans of the bankruptcy, the sale and their new employment, customers then  
6 expressed their interest in following them. The uncontroverted evidence was that  
7 clients are likely to stay with the same producer, especially where there has been a long  
8 relationship. Leach admitted this at the hearing. Eric and Herbert have been in the  
9 insurance industry for 15 and 49 years respectively. Each has long standing  
10 relationships with many of the accounts – as is evidenced by the use of Eric’s wedding  
11 list and fraternity list to compile a new customer list.

14 The tombstone announcements also did no more than simply announce the  
15 employee’s changed employment. The parties were entitled to send these  
16 announcements to their former customers utilizing information that is readily available to  
17 the public. Any initiation of business discussions by Defendants would constitute  
18 solicitation in violation of UTSA, but that generally was not proven. The testimony of  
19 Eric and Adelman that they did not initiate any business discussions or solicitation was  
20 credible. Any evidence in the future of actual solicitation of former CMM clients would  
21 still be actionable.

## 23 2) Unfair Competition – Section 17200

24 Under the Business and Professions Code § 17200, unfair competition is defined  
25 as any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive,  
26 untrue or misleading advertising and any act prohibited by Chapter 1 of Part 3 of  
27 Division 7 of the Business and Professions Code.” Cal. Bus. & Prof. Code § 17200. For  
28

1 the reasons discussed above, the Court concludes that there has been no clear  
2 showing of a likelihood of success on the merits on an unfair competition action.

3           b. Likely to Suffer Irreparable Harm in the Absence of Relief

4           Plaintiff must also demonstrate that irreparable harm is likely in the absence of  
5 an injunction. Winter, 555 U.S. 22. A preliminary injunction will not be issued simply to  
6 prevent the possibility of some remote future injury. 11A Federal Practice and  
7 Procedure § 2948.1. In other words, there must be an “existing actual threat.” Id.  
8 Monetary loss, i.e., loss of income, alone is not enough. “The possibility that adequate  
9 compensatory relief will be available at a later date, in the ordinary course of litigation,  
10 weighs heavily against a claim of irreparable injury.” Sampson v. Murray, 415 U.S. 61,  
11 90 (U.S. 1974) (citing Virginia Petroleum Jobbers Assoc. v. Federal Power Com., 259  
12 F.2d 921, 925 (D.C. Cir. 1958)).  
13  
14

15           Plaintiff portrays irreparable harm from Eric and Herbert working for Affinity.  
16 There is no doubt that Plaintiff will find, and has found, it harder to renew accounts  
17 without the people who originally obtained the accounts. But this alone does not entitle  
18 Plaintiff to an injunction as against CMM former employees acting lawfully to pursue  
19 their own future ventures in the insurance industry, especially when the only harm  
20 appears to be monetary loss. Plaintiff seeks an extraordinary remedy, to restrict former  
21 employees from pursuing a livelihood. This should only be granted upon clear evidence  
22 that such an injunction is warranted.  
23

24           Plaintiff assumed the risk that clients and producers would not stay with it after  
25 the sale. Plaintiff did not purchase the right to keep all the accounts no matter what;  
26 instead, Plaintiff purchased access and an opportunity. The value of the customer  
27 accounts was the access and opportunity to renew them, but no customer is bound to  
28

1 stay. That is the nature of a free and fluid market place. Under the standard for a  
2 preliminary injunction, the harm must be tied to some wrong doing by Defendants, the  
3 taking from the estate improperly. Plaintiff assumed the risk when it bid and now seeks  
4 to change the terms of the sale *ex post facto*.

5  
6 The Court recognizes that central to the concept of a free market is the right to  
7 have the “ingenuity and industry” that one invests in protected from the gratuitous use of  
8 that “sweat-of-the-brow” by others. Morlife, 56 Cal. App. 4th 1520 (1997). The non-  
9 compete clause in the employment agreements is intended to protect CMM’s ingenuity  
10 and industry, but its applicability and scope is better suited to be defined and examined  
11 at a hearing on the merits. The harm to Debtor, or Plaintiff, is slight when measured  
12 against the Defendants’ inability to make a living.<sup>10</sup>

13  
14 c. Balance of Equities

15 The third factor is the balance of the hardship to the respective parties. “A  
16 bankruptcy court must identify the harms which a preliminary injunction might cause to  
17 defendants and . . . weigh these against plaintiff’s threatened injury.” In re Excel  
18 Innovations, Inc., 502 F.3d 1086, 1097 (9th Cir. 2007). As a matter of law, Defendants  
19 may not solicit a client or take assets of the estate. Without a clear showing that the  
20 relief requested is warranted, the Court will not issue an injunction merely to restate  
21 existing law. The balance is equal where the likelihood of success on the merits has not  
22 been shown. While Plaintiff should be able to enjoy the results of its purchase,  
23 Defendants should be able to legally pursue their trade.

24  
25  
26 //

27  
28 //

---

<sup>10</sup> The non-compete clause omits any details as to duration or scope. The lawful nature of the non-compete clause and the extent to which it will be enforced cannot be fully ruled on at this stage.

1 d. Injunction is in the Public Interest

2 Finally, in determining whether to grant a preliminary injunction the Court must  
3 “pay particular regard for the public consequences in employing the extraordinary  
4 remedy...” Winter, 555 U.S. 26. This final factor, however, is not always implicated; the  
5 facts of each case and the legal issues implicated will control. In re Excel Innovations,  
6 Inc., 502 F.3d 1089. This final factor is neutral. This Motion involves a business  
7 dispute between certain identified parties and no others, and does not impact larger  
8 public interest issues. See Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009).

9 **Conclusion**

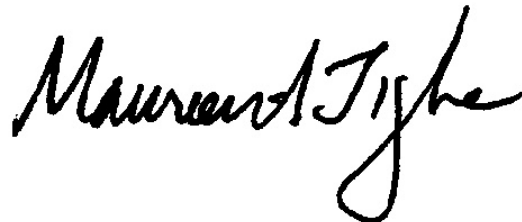
10  
11 Plaintiff failed to show that a preliminary injunction should issue. Defendants  
12 have been trying to comply with post-CMM employment restrictions and still pursue the  
13 business in which they had been engaged for many years. Leach testified at the outset  
14 of the hearing that the norm in the insurance industry is for the clients to follow the  
15 producer. He appears to have fully realized the risk Liberty took when it bid on CMM's  
16 assets, especially with the little due diligence it conducted. Liberty does not appear to  
17 have anticipated the amount of business that would follow former CMM producers as  
18 has actually left. Leach seems to have captured Plaintiff's buyer's remorse when he  
19 insisted on cross-examination that the Rothmans simply should not be speaking to any  
20 CMM clients, because Plaintiff “purchased those clients.” H'rg, April 20, 2012.  
21 Unfortunately, an emergency “as is, where is” sale of assets was not that simple.

22  
23 Despite these findings, Defendants are not free to solicit clients of CMM. They  
24 were officers and directors of CMM until the Trustee was appointed and owed a  
25 fiduciary duty throughout to CMM's creditors. Defendants risk liability at a full trial if they  
26 breached that duty. The Court recognizes that this was an early hearing, and that  
27  
28

1 limited to no discovery or investigation has been done. To the extent that any improper  
2 solicitation of CMM customers results in future diversion of funds that were otherwise  
3 property of the estate, the Trustee and Plaintiff are still permitted to pursue it.

4 The Trustee raised allegations of the transfer of life insurance immediately pre-  
5 petition and is still looking into the out of trust situation. Adelman, Affinity and the  
6 Rothmans have alleged improper statements about them to former CMM clients. All of  
7 these issues are irrelevant and resolution is unnecessary for purposes of the request for  
8 a preliminary injunction. At this time, no findings or conclusions whatsoever are made  
9 as to those issues.  
10

11 Based on all the reasons discussed herein, the Motion for a Preliminary  
12 Injunction as against Defendants is **DENIED**, without prejudice.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

25   
26  
27  
28

DATED: June 6, 2012

United States Bankruptcy Judge

## NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled MEMORANDUM OF OPINION RE PRELIMINARY INJUNCTION AS AGAINST JASON ADELMAN, AFFINITY GLOBAL INSURANCE SERVICES, HERBERT ROTHMAN, AND ERIC ROTHMAN was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

**1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** – Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of 6/6/12, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Larry W Gabriel lgabriel@ebg-law.com
- James A Hayes jhayes@cwlawyers.com
- Randal Ivor-smith rivorsmith@raineslaw.com
- Lawrence M Jacobson lmj@gfjlawfirm.com
- John C Keith jck@vrmlaw.com
- Sonia Y Lee slee@raineslaw.com, tfukutomi@raineslaw.com
- Marcy Railsback , marcy@bovinolaw.com
- United States Trustee (SV) ustpreion16.wh.ecf@usdoj.gov

☐ Service information continued on attached page

**2. SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Bradley D. Sharp (TR)  
Development Specialist, Inc.  
333 So. Grand Ave., Suite 4070  
Los Angeles, CA 90071-1524

BTJ Insurance Services, LLC  
21045 Califa Street  
Woodland Hills, CA 91364

Affinity Global Insurance Services  
Alston & Bird LLP  
Diane C. Stanfield  
333 S. Hope Street  
Sixteenth Floor  
Los Angeles, CA 90071

☐ Service information continued on attached page

**3. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

☐ Service information continued on attached page



## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 21650 Oxnard Street, Suite 500, Woodland Hills, CA 91367

A true and correct copy of the foregoing document entitled **PLAINTIFF'S REPLY TO: DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS AND STATEMENT OF GENUINE ISSUES IN DISPUTE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **November 10, 2014**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- United States Trustee (SV) ustpreion16.wh.ecf@usdoj.gov
- Daniel C. Streeter daniel.streeter@troutmansanders.com, cathe.zinn@troutmansanders.com

☐ Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL:** On **November 10, 2014**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Maureen A. Tighe  
United States Bankruptcy Court  
San Fernando Valley Division  
21041 Burbank Blvd., Suite 325  
Woodland Hills, CA 91367-6606

☐ Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on \_\_\_\_\_, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

November 10, 2014  
Date

NIKOLA A. FIELDS  
Printed Name

/s/ Nikola A. Fields  
Signature